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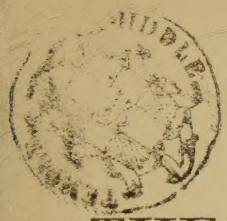

A COMPENDIUM

OF

THE LAW OF TORTS

Specially adapted for the Use of Students

BY

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Principles and Practice of the Law of Libel and Slander"

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"The Law of Parliamentary Elections and Election Petitions."

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PREFACE

TO THE TENTH EDITION.

In preparing the present edition for the press, the book has been thoroughly revised and brought up to date. I have made no alteration in the plan or general arrangement of the work, and have endeavoured, as far as possible, not materially to increase its size.

It has been found desirable to omit the pages relating to the Workmen's Compensation Acts, as an adequate treatment of the cases would have necessitated a disproportionate increase of size and have interfered with the general plan of the book. The temporary legislation passed during the war has been omitted unless reference to it has been found unavoidable.

I have to thank my friend, Mr. Roland Burrows, LL.D., Barrister-at-Law, for much valuable assistance in the preparation of this edition, and also for the time and trouble he has kindly given to the revision of the proof-sheets.

H. F.

1 Brick Court, Temple, E.C.
February, 1921.

EXTRACT FROM

PREFACE TO THE FIRST EDITION.

I AM under an obligation to the Liverpool Board of Legal Studies to supply the students who attended my lectures at Liverpool with a printed analysis of the same. The idea that such an analysis might be of some use to other students has induced me to publish this little book, which professes to be nothing more than rough notes of the outlines of my lectures delivered at Liverpool and Newcastle-upon-Tyne in the early part of last year. It was compiled, in the first instance, with the object of assisting those of my own pupils who wished to enter upon the course of study which I indicated to them in my lectures; and in preparing my notes for the press I had that object solely in view. It is not intended to be used as a cram-book, nor do I imagine that a parrot's knowledge of its contents would enable any student foolish enough to attempt to acquire it, to cheat a competent examiner into the belief that he had properly studied the Law of Torts; if, indeed, I had thought so, these pages would never have seen

the light. I venture to hope, however, that it may prove of service as an inducement to study the Law of Torts in the reported cases and in the various works I have referred to, and may prove of value to those who wish to be directed to the best sources of information on this branch of the law.

H. F.

March 16th, 1888.

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LIST OF ABBREVIATIONS.

A. & E. .....Adolphus and Ellis.
Ad. & Ecc. .....Admiralty and Ecclesiastical Cases (L. R.).
App. Cas. }
A. C. } .....Appeal Cases (L. R.).

B. & A. .....Barnewall and Alderson.
B. & Ad. .....Barnewall and Adolphus.
B. & C. .....Barnewall and Cresswell.
B. & P. .....Bosanquet and Puller.
B. & S. .....Best and Smith.
Barn. .....Barnardiston.
Bing. .....Bingham.
Bing. N. C. .....Bingham, New Cases.
Bur. .....Burrow.

C A. .....Court of Appeal.
C. B. .....Common Bench Reports.
C. B. N. S. .....Common Bench, New Series.
C. C. R. .....Court of Crown Cases Reserved (L. R.).
C. P. .....Common Pleas (L. R. and L. J.).
C. P. D. .....Common Pleas Division (L. R.).
C. & P. .....Carrington and Payne.
Camp. .....Campbell.
Ch. .....Chancery (L. R. and L. J.).
[1891], [1892], 1, 2, &c.,
Ch. .....[1891], [1892], Law Reports, 1, 2, &c., Chancery Division.
Ch. D. or Ch. Div. .....Chancery Division (L. R.).
Coke's Rep. .....Coke's Reports.
Cro. Eliz. .....Croke's Reports, temp. Elizabeth.

De G. M. & G. .....De Gex, Macnaghten and Gordon's Reports.
Dowl. N. S. .....Dowling, New Series.

E. & B. .....Ellis and Blackburn.
E. B. & E. .....Ellis, Blackburn and Ellis.
E. & E. .....Ellis and Ellis.

Eq. .....Equity (L. R.).
Esp. .....Espinasse.
Ex. ....Exchequer Reports, Exchequer (L. R. and L. J.).
Ex. D. or Ex. Div.....Exchequer Division (L. R.).
Ex. Ch., C. B. N. S....Exchequer Chamber, Common Bench Reports, New Series.
Ex. .....Exchequer Reports.

F. .....Fraser (Court of Session Cases, Scotland).
F. & F. .....Foster and Finlason.

H. & C. .....Hurlstone and Coltman.
H. & N. .....Hurlstone and Norman.
H. L. .....House of Lords (L. R.).
H. L. C.....House of Lords Cases, by Clark and Finnelly —continued by Clark.
Hagg. .....Haggard.
Hob. .....Hobart's Reports.

I. R. C. L.....Irish Reports, Common Law.

J. P. .....Justice of the Peace.
Jur. N. S. .....Jurist, New Series.

K. B. .....King's Bench (L. R. and L. J.).

L. J. .....Law Journal.
L. J. N. S.....Law Journal, New Series.
L. R. .....Law Reports.
L. R. Ir. .....Law Reports, Irish.
L. R. Ch. .....Law Reports, Chancery Appeals.
L. R. P. C. .....Law Reports, Privy Council.
L. R. Sc. App. .....Law Reports, Scotch Appeals.
L. R. Sc. & D. .....Law Reports, Scotch and Divorce Appeals.
Ld. Raym. .....Ld. Raymond's Reports.
L. T. ....Law Times.
Lofft .....Lofft's Reports.

M. & G. .....Manning and Granger.
M. P. C. C. .....Moore's Privy Council Cases.
M. & S. .....Maule and Selwyn.
M. & W. .....Meeson and Welsby.
Mod. .....Modern Reports.
Moo. & M. .....Moody and Malkin.
Moo. & R. .....Moody and Robinson.

N. & M. .....Neville and Manning.
N. Y. .....New York.

[1891], [1892], &c., P... [1891], [1892], &c., Law Reports, Probate, Divorce, and Admiralty Division.
P. C. ..... Privy Council (L. R. and L. J.).
P. W. ..... Peere Williams.
Palm. ..... Palmer.

Q. B. ..... Queen's Bench Reports, Queen's Bench (L. R. and L. J.).
[1891], [1892], &c., 1, 2, Q. B. ..... [1891], [1892], &c., 1, 2, Law Reports, Queen's Bench Division.
Q. B. D. ..... Queen's Bench Division (L. R. and L. J.).

R. & M. ..... Ryan and Moody.
R. R. ..... Revised Reports.
Rep. ..... Coke's Reports,

[1907], [1908], &c., S. C. ..... [1907], [1908], &c., Court of Session Cases (Scotland).
Salk. ..... Salkeld.
Sid. ..... Siderfin.
Sim. N. S. ..... Simons, New Series.
Sm. L. C. ..... Smith's Leading Cases.
Stark. ..... Starkie.
Str. ..... Strange.
Swanst. ..... Swanston.

T. R. ..... Term Reports.
T. L. R. ..... Times Law Reports.
Taunt. ..... Taunton.

Ves. ..... Vesey.

W. N. ..... Weekly Notes.
W. R. ..... Weekly Reporter.
W. Bl. ..... William Blackstone.

Y. B. ..... Year Books.
Yelv. ..... Yelverton.

THE LAW OF TORTS.

CHAPTER I.

OF TORT IN GENERAL.

To define a tort is well known to be difficult and unsatisfactory. The best summary of the elements of which it is composed is that given by Sir Frederick Pollock (Law of Torts, 11th ed., pp. 18, 19), and to this the reader is referred. A good description for practical purposes is: **A tort is an infringement of a general right or right in rem**—*i.e.*, a right available against the world at large.

On the one hand, a tort is to be distinguished from **crime:** on the other, from **breach of contract.**

(a) It differs from crime in respect of three considerations:—

(1) **As regards the consequences of the act or omission.**—A crime is regarded more as an injury to the whole community, considered in its social

aggregate capacity; while a tort is regarded rather as an injury to a private individual, its consequences being deemed less deleterious to the community at large.

(2) **As regards the nature of the redress or remedy.**—In tort, the wrongdoer has to compensate the injured party, while in crime he is punished by the state.

(3) **As regards procedure.**—In tort, the action is brought by the injured party; in crime, proceedings are conducted in the name of the sovereign.

All the three elements of difference go to make up the distinction. Blackstone (*a*), and Professor Holland (*b*), rely only on the first; Austin (*c*), on the third.

(b) It differs from breach of contract, in that a tort is **an infringement of a general right or a right in rem**—*i.e.*, a right available against the world at large; whereas breach of contract is an infringement of a right *in personam*—*i.e.*, a right available against a definite person or persons. The same act, however, may be both a tort and a breach of contract, or a tort and a crime.

It is also to be distinguished from **breach of certain personal relations,** such, for example, as exist between a trustee and his *cestui que trust*,

(*a*) Stephen's Commentaries, 16th ed. vol. iv. p. 3.
(*b*) Holland's Jurisprudence, 12th ed. pp. 330, 331.
(*c*) Austin's Jurisprudence, 5th ed. vol. i. pp. 404, 405.

a husband and his wife, a shipowner and his salvors (*d*).

The newness of a tort is no objection to an action if it come within any principle upon which the courts act; but the court will grant no relief if it embraces some entirely new principle (*e*).

Where there is **injuria sine damno**, *i.e.*, the infringement of a legal right without any actual loss or damage, the person whose right is infringed has a cause of action. Thus in *Ashby* v. *White* (*f*), the defendant, a returning officer, wrongfully refused to register a duly tendered vote of the plaintiff, a legally qualified voter. The candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote; nevertheless, it was held that an action lay (*g*).

Where there is **damnum sine injuria**, *i.e.*, actual and substantial loss without infringement of any legal right, no action lies: *e.g.*, A. and B.

(*d*) For the general theory determining liability in tort, the student is referred to "The Common Law," by Mr. Justice O. W. Holmes, Lectures III. and IV.; more particularly pp. 161—163.

(*e*) Per Ashurst, J., in *Pasley* v. *Freeman* [1789] 3 T. R. 51; 1 R. R. 634; cf. the observations of Lord Halsbury in *Janson* v. *Driefontein Mines* [1902] A. C. 484, at p. 491.

(*f*) [1703] Lord Raym. 938; cf. *Fulton* v. *Norton* [1908] A. C. 451.

(*g*) It is worth noticing, however, that Holt, C.J., expressly negatived the doctrine of *injuria sine damno*. See "The Judgments delivered by Chief Justice Holt, &c.," published by Messrs. Saunders & Benning, London, 1837.

are rival schoolmasters; A. sets up a rival school next door to B.'s, and boys from B.'s school flock to A.'s. B. has no right of action against A., for no legal right has been infringed (*h*).

Sometimes there is no *injuria* unless there is *damnum*—*i.e.*, in some cases actual damage is a necessary part of the cause of action, or, in other words, is the gist of the action; for instance, this is so in actions of conspiracy (*i*), maintenance (*j*), deceit (*k*), negligence (*l*), nuisance (*m*), and slander not actionable *per se* (*n*).

(*h*) *Gloucester Grammar School case* [1410-11], in Year Book of 11 Henry 4, fol. 47, pl. 21; see also *Chasemore* v. *Richards* [1859] 7 H. L. C. 349; *Dibden* v. *Skirrow* [1908] 1 Ch. 41; *Maxey Drainage Board* v. *Great Northern Ry. Co.* [1912] 106 L. T. 429; and *infra*, pp. 30—32, and p. 122.

(*i*) *Infra*, pp. 121—124.

(*j*) *Infra*, p. 125.

(*k*) *Infra*, p. 190.

(*l*) *Infra*, p. 204.

(*m*) *Infra*, p. 82.

(*n*) *Infra*, pp. 140—142.

CHAPTER II.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE ARISING FROM PERSONAL DISABILITY.

CERTAIN persons are not capable of suing or liable to be sued in tort owing to personal disability.

Categories of such persons.

(i.) An **alien enemy** is a person of enemy nationality or a person residing in enemy territory, whatever his nationality (*a*). An alien enemy cannot sue (*b*), unless he has an express or implied licence to remain in this country (*c*), but he may be sued (*d*). An alien friend is under no such disability (*e*).

A company incorporated in another country is in the same position as an alien individual (*f*). A company incorporated here may, by virtue

(*a*) *Scotland* v. *South African Territories* [1917] 33 T. L. R. 255.

(*b*) *Porter* v. *Freudenberg* [1915] 1 K. B. 857; *Halsey* v. *Lowenfeld* [1916] 2 K. B. 707; *De Wahl* v. *Braune* [1856] 1 H. & N. 178; *Netherlands S. African Ry.* v. *Fisher* [1901] 18 T. L. R. 116.

(*c*) *Schaffenius* v. *Goldberg* [1916] 1 K. B. 284; *Nordman* v. *Rayner* [1916] 33 T. L. R. 87.

(*d*) *Robinson* v. *Mannheim Ins. Co.* [1915] 1 K. B. 155.

(*e*) Dyer, 2 b; Com. Dig. Alien, C. 5.

(*f*) *Dutch West India Co.* v. *Henriques* [1725, 1729] Stra. 612, 808; and *Janson* v. *Driefontein Mines* [1902] A. C. 484.

of the control exercised by alien enemies, be treated as an alien enemy (*g*).

(ii.) **A felon** at common law could not sue for torts to his property, because his property was forfeited to the Crown, but forfeiture for felony was abolished by the Forfeiture Act, 1870 (*h*). By that Act a **convict** as therein defined (*i.e.*, any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony (*i*), whose sentence is in force and unexpired, and who is not "lawfully at large under any licence," cannot sue "for the recovery of any property, debt, or damage whatsoever" (*j*). It would appear, however, that a felon who does not come within the operation of the Act, for instance one who has only been sentenced to imprisonment, may sue for wrongs to his property in his own name. At common law a felon might sue for personal injuries (*k*), and it would seem that he can still do so even if he comes within the operation of the Act (*l*).

(iii.) An **infant** may be sued for a tort, but not

(*g*) *Daimler Co.* v. *Continental Tyre Co.* [1916] 2 A. C. 307; but see *Re Hilckes* [1917] 1 K. B. 48.

(*h*) 33 & 34 Vict c. 23.

(*i*) Sect. 6.

(*j*) Sects. 8, 30.

(*k*) Com. Dig. Forfeiture, B. 2; cf. *In re Gaskell and Walters* [1906] 22 T. L. R. 464.

(*l*) For the term "damage" in sect. 8 would probably be held to be restricted in its application to damage to property. See "The Law of Torts," by Clerk and Lindsell, 6th ed. p. 46.

when it would have the effect of making him liable on a contract which he could not otherwise be liable upon; but the exception does not extend to protect an infant from the consequences of a wrong which has been induced by, and has arisen out of, a contract, but which is independent of the contract in the sense of not being an act of the kind contemplated by it. In *Jennings* v. *Rundall* (*m*), the defendant, who was an infant, hired a mare for riding, and injured it by over-riding. Held, defendant's infancy was a good defence, the action being founded on contract. In *Burnard* v. *Haggis* (*n*), there was a similar contract, but defendant was expressly told that the mare must not be used for leaping. The mare was put at a fence, and in attempting to take it fell upon a stake, and was so injured that she died. Held, that the infant had committed an actionable wrong, and was therefore liable irrespective of the contract.

Further, **an infant is not allowed to take advantage of his own fraud,** and will be liable in equity to make restitution, where that is possible, for any advantage he has thereby gained (*o*).

(*m*) [1799] 4 T. R. 335; 4 R. R. 680; and see *Cowern* v. *Nield* [1912] 2 K. B. 419; following *Bristow* v. *Eastman* [1794] 1 Esp. 172.

(*n*) [1863] 14 C. B. N. S. 45.

(*o*) *Stocks* v. *Wilson* [1913] 2 K. B. 235 (where Lush, J., reviewed the cases); *Bartlett* v. *Wells* [1862] 31 L. J. Q. B. 57; *Lemprière* v. *Lange* [1879] 12 Ch. D. 675; cf. *Woolf* v.

An infant can, of course, sue for any tort done to him. Infancy is no bar to the defence of common employment (*p*).

In actions of torts, as in other actions, an infant sues by his next friend (*q*), and defends by his guardian *ad litem*.

(iv.) **Married women** *at common law* were not liable on contracts, and, consequently, the same rule applied to the contract of a married woman as to that of an infant—that it could not be indirectly enforced by framing the pleadings in tort (*r*). **In all real cases of tort,** however, a married woman is as liable as anybody else; but inasmuch as in the eye of the law she had no separate existence of her own apart from her husband, her husband had to be sued jointly with her (*s*).

There was, however, no cause of action against the husband personally; for he could only be rendered liable by being joined as a defendant, and this was necessary inasmuch as the wife

Woolf [1899] 1 Ch. 343; *Levene* v. *Brougham* [1909] 25 T. L. R. 265; but see *Leslie* v. *Shiell* [1914] 3 K. B. 607.

(*p*) *Bass* v. *Hendon U. D. C.* [1914] 28 T. L. R. 317; and see p. 49, *infra*.

(*q*) If the action fails the next friend is personally liable for defendant's costs, but is entitled to an indemnity from the infant: *Steeden* v. *Walden* [1910] 2 Ch. 393.

(*r*) *Earle* v. *Kingscote* [1900] 2 Ch. 585.

(*s*) *Liverpool Adelphi Loan Association* v. *Fairhurst* [1854] 9 Ex. 422; *Cole* v. *De Trafford* [1917] 1 K. B. 911.

could be neither a plaintiff alone nor a defendant alone.

If the husband died during the suit, the action continued against the wife; but if the wife died the action abated (*t*).

To charge the husband, therefore, it is necessary to sue him jointly with his wife in an action and to prosecute the same to judgment before his death or the pronouncement of a decree of divorce or of a decree of judicial separation (*u*). Separation by deed does not affect the husband's position at common law (*x*).

Under the **Married Women's Property Act, 1882** (45 & 46 Vict. c. 75), the wife is liable for her **antenuptial** torts, and may be sued for them, and sums recovered against her are to be paid out of her separate property (*y*): the husband is also liable to the extent of the property he has obtained through his wife (*z*), and may be sued jointly with her or alone (*a*).

For torts committed by or against a wife **during marriage** she is sued or sues just as a *feme*

(*t*) *Capel* v. *Powell* [1864] 17 C. B. N. S. 743; see per Erle, C.J., at p. 748.

(*u*) *Cuenod* v. *Leslie* [1909] 1 K. B. 880; *Capel* v. *Powell* (1864), 17 C. B. N. S. 743; *White* v. *Leonard* (1861) 30 L. J. C. P. 365, per Willes, J., at p. 367; and 20 & 21 Vict. c. 85, ss. 25 and 26.

(*x*) *Uttley* v. *Mitre Publishing Co.* [1901] 17 T. L. R. 720.

(*y*) 45 & 46 Vict. c. 75, s. 13.

(*z*) *Ibid.*, sect. 14.

(*a*) *Ibid.*, sect. 15.

sole, and sums recovered against her are to be paid out of her separate estate, and sums she recovers are part of her separate estate (*b*). The husband may or may not be joined with her in these actions, since the case of *Seroka* v. *Kattenburg* (*c*) has decided that the husband's position at common law with regard to his wife's torts committed during marriage is not interfered with by the Act. So where a husband is joined as a defendant with his wife, only one defence is available, and consequently a defence set up by the wife which is inconsistent with one already set up by the husband will be struck out (*d*).

As to torts committed **against the wife by her husband,** the wife may sue her husband for the protection and security of her own separate property; but further than that, no husband or wife is entitled to sue the other in tort (*e*). Thus, a wife cannot sue her husband for malicious prosecution (*f*).

(v.) **Bankrupts.** If a man is adjudicated bankrupt, his property becomes vested in a

(*b*) 45 & 46 Vict. c. 75, sect. 1, sub-sect. 2.

(*c*) [1886] 17 Q. B. D. 177; approved in *Earle* v. *Kingscote* [1900] 2 Ch. 585 (C. A.); but see the criticisms of Moulton, L.J., in *Cuenod* v. *Leslie* [1909] 1 K. B. at pp. 888, 889.

(*d*) *Beaumont* v. *Kaye* [1904] 1 K. B. 292.

(*e*) 45 & 46 Vict. c. 75, s. 12; *Hulton* v. *Hulton* [1917] 1 K. B. 813; cf. *Reg.* v. *Lord Mayor of London* [1886] 55 L. J. M. C. 118.

(*f*) *Tinkley* v. *Tinkley* [1909] 25 T. L. R. 264.

trustee for division among his creditors (*g*); but all his rights do not pass to the trustee in this way. Thus, if he has a right of action against a third person for a tort which only affects his person, reputation or feelings, such as false imprisonment, defamation, or trespass without damage, that right does not pass, and he can still sue as if the bankruptcy had never occurred (*h*). If, on the other hand, the tort injures his estate, as in the case of deceit or slander of title, then the right of action passes to the trustee, and the bankrupt cannot sue (*i*). In certain cases, however, the tort may affect the bankrupt personally as well as his property, and then either the cause of action is divided between him and the trustee or they must join together in bringing the action (*k*).

(vi.) **Corporations.** For a long while difficulties, due rather to considerations of procedure than to any fancied obstacle arising from a corporation's artificial personality, were felt in admitting that a corporation could be sued. In 1812 it was held, in *Yarborough* v. *Bank of England* (*l*), that trover lay against a corpora-

(*g*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), ss. 18 (1), 38, 53 (2).

(*h*) *Rose* v. *Buckett* [1901] 2 K. B. 449; *Stanton* v. *Collier* [1854] 23 L. J. Q. B. 116.

(*i*) *Hodgson* v. *Sidney* [1866] L. R. 1 Ex. 313; *Morgan* v. *Steble* [1872] L. R. 7 Q. B. 611.

(*k*) See *Beckham* v. *Drake* [1850] 2 H. L. Cas. at p. 632.

(*l*) 16 East, 6.

tion; and in 1842, in *Maund* v. *Monmouthshire Canal Co.* (*m*), that **trespass** also lay. It was formerly doubted whether a corporation, being incapable in its corporate character of a malicious intention, could be liable to an action for **malicious prosecution** (*n*); but it was finally decided that such an action would lie (*o*). It is now clear law that a corporation is liable for torts committed by its servants and agents, provided (1) the thing done is within the powers and for the purposes of the corporation, and (2) done so that it would be actionable if done by an individual (*p*).

(vii.) **Lunatics.** It is still uncertain to what extent a lunatic or person of unsound mind is liable in tort.

It is obvious that there are a number of torts he cannot commit (*q*).

A lunatic so found sues or defends by his committee; if not so found, he sues by his next friend and defends by his guardian *ad litem*.

(*m*) 4 M. & G. 452.

(*n*) *Stevens* v. *Midland Counties Ry. Co.* [1854] 10 Ex. 352.

(*o*) *Edwards* v. *Midland Ry. Co.* [1880] 6 Q. B. D. 287; *Kent* v. *Courage* [1891] 55 J. P. 264; *Rayson* v. *South London Tramways Co.* [1893] 2 Q. B. 304; *Cornford* v. *Carlton Bank* [1899] 1 Q. B. 392; affirmed on another point [1900] 1 Q. B. 22 (C. A.); *Citizens Life Assurance Co.* v. *Brown* [1904] A. C. 423. See also Clerk and Lindsell on Torts, 6th ed. p. 62, note (*d*).

(*p*) See pp. 34—56, *infra*, and the cases there cited.

(*q*) See Pollock's Torts, 11th ed. pp. 53—55, cf. *Rex* v. *Meade* [1909] 1 K. B. 895 (explained in *Rex* v. *Beard* [1920] A. C. 479).

(viii.) **Foreign sovereigns** and **ambassadors** (*r*) resident in this country can sue in an English court (*s*), but cannot be sued unless indeed they waive their privilege by voluntary submission to the jurisdiction or otherwise (*t*). A diplomatic agent cannot waive his privilege without the sanction of his sovereign (*u*).

If, however, they do sue, they submit to all proceedings available to the defendant in respect of the claim (*x*), but the defendant cannot raise a counterclaim which has nothing to do with the original claim (*y*).

There is no rule that the monarch or other titular head of a foreign sovereign state is alone

(*r*) By Art. 7 of the Treaty of Versailles with Germany, "Representatives of the Members of the League (of Nations) and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

(*s*) Diplomatic Privileges Act, 1708; *King of Spain* v. *Hulett* [1828] 1 Dow. & Cl. 169; *Republic of Peru* v. *Weguelin* [1872] L. R. 7 C. P. 352; [1875] 20 Eq. 140; *Magdalena Steam Navigation Co.* v. *Martin* [1859] 28 L. J. Q. B. 310.

(*t*) *Duke of Brunswick* v. *King of Hanover* [1848] 2 H. L. C. 1; *Taylor* v. *Best* [1854] 23 L. J. C. P. 89, 93; *The Parlement Belge* [1880] 5 P. D. 197; 214; *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149; *The Jassy* [1906] P. 270; *Statham* v. *Statham* [1912] P. 92.

(*u*) *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139, and *In re Suarez* [1918] 1 Ch. 176.

(*x*) *Republic of Costa Rica* v. *Erlanger* [1876] 3 Ch. D. 62.

(*y*) *South African Republic* v. *La Cie. Franco-Belge* [1898] 1 Ch. 190; cf. *Imperial Japanese Government* v. *P. & O. Co.* [1895] A. C. 644.

capable of suing here in respect of the public property or interest of that state (*z*).

(ix.) The Trade Disputes Act, 1906 (*a*), has added an entirely new exception. By virtue of its provisions no court shall entertain an action against a **Trade Union,** whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union (*b*).

It has been held, however, that the Act does not protect the persons who actually commit the tort on behalf of the trade union, unless a trade dispute (*c*) is in existence or contemplation (*d*).

When an order has been made against a person under the Vexatious Actions Act, 1896, he cannot bring any civil action without leave (*e*).

(*z*) *Yzquierdo* v. *Clydebank Engineering Co.* [1902] A. C. 524.

(*a*) 6 Edw. 7, c. 47, s. 4 (1), cf. s. 3; and see *Valentine* v. *Hyde* [1919] 2 Ch. 129; *Hodges* v. *Webb* [1920] 2 Ch. 70.

(*b*) *Vacher* v. *London Society of Compositors* [1913] A. C. 107.

(*c*) See pp. 123—124, *infra*.

(*d*) *Richards* v. *Bartrum* [1908)] 25 T. L. R. 181; *White* v. *Riley* [1920] 36 T. L. R. 849.

(*e*) See *In re Boaler* [1915] 1 K. B. 21.

CHAPTER III.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE ARISING FROM THE EXISTENCE OF SPECIAL CIRCUMSTANCES.

CERTAIN acts would fall within the sphere of tort, rendering the doer liable to an action for damages, were it not for their being of an altogether exceptional nature (*a*).

Categories of such exceptions (*b*).

[**Definition.**—Actor: a person who does an act which but for special matter of excuse or justification would be actionable.]

I. Privilege of actor.

1. Public.
   - *a*. Acts of state.
   - *b*. Judicial acts, *i.e.*, acts of judicial officers in the course of their duty.
   - *c*. Executive acts, *i.e.*, acts of executive officers in the course of their duty.

(*a*) It is due to Sir Frederick Pollock to state here that I am much indebted to him in respect of this chapter. For a full and exhaustive discussion of its subject-matter the reader is referred to Book I. Chap. IV. of that learned author's treatise on the Law of Torts.

(*b*) The threefold division given in the text does not profess to be anything more than a rough classification.

2. Private.
   a. Quasi-judicial acts, *e.g.*, of committee of club.
   b. Disciplinary powers of private persons.
   c. Powers conferred by law.

II. Equal rights.

1. Inevitable accident.
2. Exercise of common rights, *e.g.*, trade competition.

III. Sufferer disentitled.

1. Leave and licence.
2. Self-defence.
3. Acts of necessity.

I. Privilege of actor.

1. Public.

a. **An act of state** is either—

(i.) An act done by a foreign prince or ruler or his representative, *e.g.*, the ambassador of some other sovereign state, in his political capacity (*c*); or

(ii.) An act done by a representative of the Crown (previously sanctioned or subsequently ratified by the Crown),

(*c*) *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* [1859] 13 M. P. C. 22; *Carr* v. *Fracis, Times & Co.* [1902] A. C. 176.

affecting the person or property of some one not a British subject.

In *Buron* v. *Denman* (*d*), plaintiff sued defendant, a naval captain, for burning plaintiff's barracoons and releasing slaves in them. It was held that defendant was not liable, having acted in the capacity of an officer of the Crown, and the Crown having accepted his act as its own.

The rule laid down in this case applies only to an action by a foreigner. But it probably also applies where the act complained of is an act of state, *e.g.*, annexation, which itself makes the intending plaintiff a subject (*e*).

As between a sovereign and his subjects, there is no such thing as an act of state; *i.e.*, to plead the sovereign's command is no excuse, unless such command is lawful in itself, "for the warrant of no man, not even of the King himself, can excuse the doing of an illegal act" (*f*). It is for the

(*d*) [1859] 2 Ex. 167.

(*e*) *Cook* v. *Sprigg* [1899] A. C. 552; *Salaman* v. *Secretary for India* [1906] 1 K. B. 613; cf. *West Rand Mining Co.* v. *Regem* [1905] 2 K. B. 391.

(*f*) Per cur. in *Sands* v. *Childs and others* [1693] 3 Lev. 352.

Court to determine whether the command is or is not lawful (*g*).

In accordance with the principle laid down above, "if any person commits a wrongful act, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of state" (*h*). Under the ordinary law of agency, however, "the head of a Government department is not liable for the neglect or torts of officials in the department, unless it can be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual, just as a stranger committing the same act would be" (*h*). This rule applies where the Government Department is a corporation (*i*).

(*g*) As to the position of the agents of the Government when martial law is proclaimed see *Marais* v. *General Officer Commanding* [1902] A. C. 109; *Ex parte Mgomini* [1906] 94 L. T. 558. As to the present war, see the Indemnity Act, 1920.

(*h*) Per Romer, L.J., in *Raleigh* v. *Goschen* [1898] 1 Ch. at p. 77; cf. *Bainbridge* v. *P. M. G.* [1906] 1 K. B. 178; *Rex* v. *Earl of Crewe* [1910] 2 K. B. 576.

(*i*) *Roper* v. *Public Works Commissioners* [1915] 1 K. B. 45.

The Governor of a Colony does not possess sovereign power. His authority is derived from his commission and is limited to the powers expressly or impliedly granted to him. Consequently he may be sued in the Courts of England or of his Colony (*j*).

b. **Judicial acts.** — Judges of superior courts,—*i.e.*, the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice and any Divisional Court thereof (*k*), Courts of Nisi Prius and Assize (*l*),— are not liable for acts done in their judicial capacity, or for errors of judgment, but—

(i.) By 31 Car. 2, c. 2, s. 9, a judge in vacation who refuses to grant a writ of *habeas corpus* is liable;

(ii.) By 13 Edw. 1 (St. West. 2), c. 31, a judge who refuses to seal a bill of exceptions is liable (*m*).

(*j*) *Mostyn* v. *Fabrigas* [1774] 1 Cowp. 161; *Cameron* v. *Kyte* [1835] 3 Knapp, P. C. C. 332; *Phillips* v. *Eyre* [1870] L. R. 6 Q. B. 1; and *Musgrave* v. *Pulido* [1880] 5 App. Cas. 102.

(*k*) Judicature Act, 1873, s. 29.

(*l*) *Ex parte Fernandez* (1861), 30 L. J. C. P. 321.

(*m*) This practice is now obsolete.

The same immunity applies to judges of inferior courts (*n*), but **in a superior court** it is presumed that everything is within its jurisdiction, and the plaintiff must prove the contrary. In **inferior courts,** there is no such presumption, and the judge must prove that the act complained of is within his jurisdiction (*o*).

Members of naval and military courts-martial are not liable for acts done in their capacity as such (*p*); nor is a member of an ecclesiastical court (*q*).

An arbitrator, or quasi arbitrator, as being *in loco judicis*, if acting honestly, is not liable for negligence or errors in judgment (*r*); but he is, of course, liable for fraud or collusion (*s*). A mere valuer, on the other

(*n*) *Scott* v. *Stansfield* [1868] L. R. 3 Ex. 220.

(*o*) *Houlden* v. *Smith* [1850] 14 Q. B. 841; cf. *Allbutt* v. *Gen. Med. Council* [1889] 23 Q. B. D. 400; *Quinn* v. *Pratt* [1908] 2 Ir. R. 69.

(*p*) *Dawkins* v. *Lord Rokeby* [1875] L. R. 7 H. L. 744; *Dawkins* v. *Prince Edward of Saxe-Weimar* [1876] 1 Q. B. D. 499.

(*q*) *Barratt* v. *Kearns* [1905] 1 K. B. 504.

(*r*) *Stevenson* v. *Watson* [1879] 4 C. P. D. 148 (architect nominated to certify what was due to contractor). See also *Chambers* v. *Goldthorpe* [1901] 1 K. B. 624.

(*s*) *Ibid.* See also *Pappa* v. *Rose* [1872] L. R. 7 C. P. 525.

hand, not being *in loco judicis*, is liable for negligence (*t*).

c. **Executive acts.**—No action lies against a public officer for the regular enforcement of any sentence or process of law within the jurisdiction of the court under whose authority he acts, but he must act "in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which, on the face of it, he is bound to obey" (*u*). Where, however, the court issuing process has no jurisdiction, officers are liable at common law (*w*); but a constable or officer acting under a justice's warrant is protected by 24 Geo. 2, c. 44, s. 6, if he produce a copy of such warrant within six days of demand.

By the Public Authorities Protection Act, 1893 (*x*), every action (*y*)

(*t*) *Turner* v. *Goulden* [1873] L. R. 9 C. P. 57.

(*u*) Pollock, 11th ed. p. 121. See also *Mayor of London* v. *Cox* [1867] 2 H. L. at p. 269.

(*w*) *Clark* v. *Woods* [1848] 2 Ex. 395.

(*x*) 56 & 57 Vict. c. 61.

(*y*) Claims under the Workmen's Compensation Act, 1906, are not included, *Fry* v. *Cheltenham Corporation* [1912] 81 L. J. K. B. 41; nor are the prerogative writs such as *certiorari*, *Roberts* v. *Battersea Council* [1914] 110 L. T. 566, or *mandamus*: *Rex* v. *Port of London Authority* [1919] 1

brought against any person for any act (*z*) done in pursuance or execution or intended execution of any statutory (*a*) or public duty or authority (*b*), *must be brought* (*c*) **within six months** from the date of the act complained of, and the defendant is entitled, in lieu of or in addition to any other plea, to plead tender of amends before the action was commenced. The Act

K. B. 176. A claim for compensation under the Riot Act is not within this Act: *Kaufman* v. *Liverpool Corporation* [1916] 1 K. B. 860.

(*z*) As to what acts are within the statute, see *Greenwell* v. *Howell* [1903] 1 Q. B. 535; *Offin* v. *Rochford R. D. C.* [1906] 1 Ch. 342; *Lyles* v. *Southend Corporation* (1905) 2 K. B. 1; *Salisbury* v. *Gould* [1904] 68 J. P. 158; *Rex* v. *Carter* [1904] 68 J. P. 466; *Walsh* v. *Southwark Borough Council* [1908] 72 J. P. 71; *Merrick* v. *Liverpool Corporation* [1910] 2 Ch. 449; *Att.-Gen* v. *West Ham Corporation* [1910] 2 Ch. 560; and *H.M. Tug Dancer II.* [1920] P. 104. As to the time from which the statute begins to run, see *Polley* v. *Fordham* [1904] 2 K. B 345; *Hague* v. *Doncaster R. D. C.* [1909] 100 L. T. 121; *Harrington* v. *Derby* [1905] 1 Ch. 205; *Att.-Gen.* v. *Lewes Corporation* [1911] 2 Ch. 495.

(*a*) This is not confined to public Acts: *Bennett* v. *Stepney Corporation* [1912] 107 L. T. 383. Acts merely incidental to such duties are not within this Act: *Clarke* v. *St. Helens* [1916] 85 L. J. K. B. 17.

(*b*) This will include what is called "municipal trading" under statutory powers if a duty is imposed but not otherwise. See *Blake* v. *London C. C.* [1904] 2 K. B. 501; and *Clayton* v. *Pontypridd U. D. C.* [1918] 1 K. B. 219; but see *Bradford Corporation* v. *Myers* [1916] 1 A. C. 242.

(*c*) Mere negotiation is not enough: *Hewlett* v. *London C. C.* [1908] 72 J. P. 136.

also provides (*d*) that if the plaintiff has not, in the opinion of the Court, afforded the defendant sufficient opportunity of tendering amends before the commencement of the action, the Court may award costs to the defendant. When costs are awarded to a public authority, they are to be taxed "as between solicitor and client" (*e*).

The Act is not confined to "local authorities," and consequently applies to such bodies as the Tyne Improvement Commissioners (*f*) and the Mersey Docks and Harbour Board (*g*). It does not, however, apply to an independent contractor doing the work the authority is authorized to do (*h*).

An action under Lord Campbell's Act is within the statute (*i*) but not an action against a public authority

(*d*) Sect. 1, sub-sect. (*d*).

(*e*) *Gilbert* v. *Gosport U. D. C.* [1916] 2 Ch. 587. The Court's discretion in awarding costs is not taken away: *Bostock* v. *Ramsey U. D. C.* [1900] 2 Q. B. 616. As to costs in the County Court, see *Tory* v. *Dorchester* (1907) 1 K. B. 393.

(*f*) *The Johannesburg* [1907] P. 65.

(*g*) *Williams* v. *Mersey Docks and Harbour Board* [1905] 1 K. B. 804.

(*h*) *Tilling* v. *Dick Kerr & Co.* [1905] 1 K. B. 562; *Kent County Council* v. *Folkestone Corporation* [1905] 1 K. B. 620.

(*i*) *Williams* v. *Mersey, &c., Board*, note (*g*) *supra*; *Gawley* v. *Belfast Corporation* [1908] 2 Ir. R. 34.

for fraudulent misrepresentation (*k*). Appeals are not within the Act (*l*).

2. Private.

a. **Quasi-judicial acts,** *e.g.*, acts of Universities, Colleges, club committees, Inns of Court.

Persons exercising quasi-judicial powers are not liable for removing a man from office or membership, or otherwise dealing with him to his disadvantage, provided they "follow the requirements of natural justice" (*m*), that is—

(1) act in good faith (*n*);

(2) give him a fair and sufficient notice of his offence;

(3) give him an opportunity of defending himself (*o*);

(4) observe the rules (*p*) (if any) laid down by statute or by the particular body to which they belong.

(*k*) *Pearson* v. *Dublin Corporation* [1907] A. C. 351; cf. *The Burns* [1907] P. 137; *Holsworthy U. D. C.* v. *Holsworthy R. D. C.* [1907] 2 Ch. 62.

(*l*) *Fielden* v. *Morley* [1900] A. C. 133; *Montgomery* v. *Haddington* [1908] A. C. at p. 175.

(*m*) *Hope* v. *I'Anson* [1901] 18 T. L. R. 201, at p. 206.

(*n*) *Law* v. *Chartered Institute of Patent Agents* [1919] 2 Ch. 276.

(*o*) *Gray* v. *Allison* [1909] 25 T. L. R. 531; cf. *Ex parte Chang* [1909] A. C. 312; but see *Green* v. *Howell* [1910] 1 Ch. 495 (C. A.). A notice sent by post is enough: *James* v. *Institute of Chartered Accountants* [1907] 98 L. T. 225 (C. A.).

(*p*) *Young* v. *Ladies' Imperial Club* [1920] 2 K. B. 523.

If these conditions are satisfied the Court will not interfere, even if it thinks the decision is wrong (*q*).

If there is a statute which gives absolute discretionary powers there is no necessity to show proceedings in the nature of judicial proceedings, or, indeed, any reason at all for the act complained of (*r*).

b. **Disciplinary powers of private persons.**

Parents and persons *in loco parentis* are not liable for exercising summary force and restraint, if acting *bona fide* and in a reasonable and moderate manner (*s*).

The master of a merchant ship has by necessity the right of using force to preserve order and discipline (*t*); but where the case admits of delay, proper inquiry should precede the act.

(*q*) *Dawkins* v. *Antrobus* (plaintiff expelled from club) [1881] 17 Ch. D. 615; *Labouchere* v. *Wharncliffe* [1880] 13 Ch. D. 346; *Weinberger* v. *Inglis* [1919] A. C. 606 (a case of re-election to the Stock Exchange).

(*r*) *Hayman* v. *Governors of Rugby School* [1874] L. R. 18 Eq. 28; *Abergavenny* v. *Llandaff* (*Bp. of*) [1888] 20 Q. B. D. 460; cf. *Wood* v. *Prestwich* [1911] 27 T. L. R. 268

(*s*) Blackstone, i. 453; *In re Agar-Ellis* [1883] 24 Ch. D. 321; *Cleary* v. *Booth* [1893] 1 Q. B. 465; see also *Mansell* v. *Griffin* [1908] 1 K. B. 947 (C. A.) and Clerk and Lindsell on Torts, 6th ed., pp. 231—234. This right is expressly saved in the Children's Act, 1908, s. 37.

(*t*) Per Lord Stowell, in *The Agincourt* [1824] 1 Hagg. 271. 274.

c. **Powers conferred by law.**

Where damage incidentally arises from an act authorized by statute, no action lies if such act be done with judgment and caution (*u*), and the injured party can only recover such compensation as the statute gives him (*x*). In *Rex* v. *Pease* (*y*), it was held that where the legislature has authorized a railway company to lay down a railway alongside a public highway, it must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highway, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway. This case was confirmed and extended in *Hammersmith Railway Co.* v. *Brand* (*z*), where it was held that the Lands Clauses Consolidation Act and Railway Clauses Consolidation Act do not contain provisions under which

(*u*) Per Lord Truro, in *L. & N. W. Ry. Co.* v. *Bradley* [1851] 3 Mac. and G. at p. 341, and per cur. in *East Fremantle Corporation* v. *Annois* [1902] A. C. at p. 217; and see *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14.

(*x*) Per Lord Blackburn, in *Geddis* v. *Proprietors of Bann Reservoir* [1878] 3 App. Cas. at p. 455; *Southwark* v. *Wandsworth* [1898] 2 Ch. 603; but see *Piggott* v. *Middlesex C. C.* [1909] 1 Ch. 134.

(*y*) [1832] 4 B. & Ad. 42; *Gunter* v. *James* [1908] 72 J. P. 448; but see *Wing* v. *London General Omnibus Co.* [1909] 2 K. B. 652.

(*z*) [1869] L. R. 4 H. L. 171.

a person whose land is not taken by the railway company can obtain statutory compensation for damage occasioned, without negligence, by the vibration of passing trains.

In *L. B. & S. C. Railway Co.* v. *Truman* (*a*), the appellant company was held not liable to occupiers of houses near the company's station for noises and annoyance caused by cattle and drovers on the company's land.

In *Vaughan* v. *Taff Vale Railway Co.* (*b*), the defendant company was held not liable for damage caused by sparks from their engines setting fire to the dry plantation of the plaintiff, as they were authorized to use such engines, and had adopted every precaution which science could suggest to prevent injury. This application of the principle to railway fires has been altered by the Railway Fires Act, 1905 (*c*), which takes away this defence, in actions for

(*a*) [1885] 11 App. Cas. 45.

(*b*) [1860] 6 H. & N. 679 (Ex. Ch.). See also *Sadler* v. *South Staffordshire, &c., Co.* [1889] 23 Q. B. D. 17; *Harrison* v. *Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409; *Port Glasgow Sailcloth Co.* v. *Caledonian Ry. Co.* [1893] Sess. Cas. ser. iv. vol. 20, p. 35; *C. P. Ry. Co.* v. *Roy* [1902] A. C. 220.

(*c*) 5 Edw. 7, c. 11, s. 1. It is a condition precedent that notice of claim must be given within seven days and particulars, including amount, within fourteen days: *Martin* v. *Great Eastern Ry Co.* [1912] 2 K. B. 406.

damage to agricultural lands or crops caused by sparks from engines, where the claim for damage does not exceed £100.

In *Smith* v. *L. & S. W. Railway Co.* (*d*) defendant company's workmen in a hot summer left some grass lying for a fortnight close to the line. The sparks from an engine set fire to this dry grass, and the fire, thus begun, spread and ultimately burnt down plaintiff's cottage. Held, defendants were liable, having been guilty of negligence.

Whether an act amounting to a nuisance is justified or not by statute is a question of construction in each case (*e*).

In *Truman* v. *L. B. & S. C. Railway Co.* (*f*), Bowen, L.J., mentioned the three types of authorization a statute may give: (1) the statute may authorize a nuisance; (2) it may authorize certain works, provided they can be done without causing a nuisance; or (3) it may authorize works to be carried out, if possible, without a nuisance, but may authorize the nuisance itself, if necessary, in the last resort.

Cases where the statute (1) "**directs that a thing shall at all events be done,**" as in *Hammer-*

(*d*) [1870] L. R. 6 C. P. 14.

(*e*) *Canadian Pacific Ry. Co.* v. *Peake* [1899] A. C. 535.

(*f*) [1885] 29 Ch. D. at p. 108; see also the observations of Cozens-Hardy, M.R., in *Price* v. *London C. C.* [1908] 2 Ch. at pp. 543, 544.

smith Railway Co. v. *Brand* (*g*), must be distinguished from those in which (2) **only a discretionary power, with choice of time and place, is given.** In the latter case due regard to the common rights of others must be exercised (*h*).

In *Metropolitan Asylum District Board* v. *Hill* (*i*), it was held that a district board could not set up a statute authorizing a small-pox hospital as an answer to an action, or to prevent an injunction issuing to restrain the board from establishing a hospital where the establishment of such hospital would be a nuisance. They must find a different site where they would not be creating a nuisance.

(3) An example of the third case is *L. B. & S. C. Railway Co.* v. *Truman* (*k*).

II. Equal rights.

1. Inevitable accident.

It has been a matter of much discussion whether an inevitable accident—*i.e.*, an accident not avoidable by any such precaution as a reasonable man could be expected to take—is a good defence to an

(*g*) *Supra*, p. 26.

(*h*) *Morrison* v. *Sheffield Corporation* [1917] 2 K. B. 866

(*i*) [1881] 6 App. Cas. 193. See also *Rapley* v. *London Tramways Co.* [1893] 2 Ch. 588; *West* v. *Bristol T. Co.* [1908] 2 K. B. 14 (C. A.); and *Liverpool, &c., S.S. Co.* v. *Mersey Trading Co.* [1909] 1 Ch. 209 (C. A.).

(*k*) *Supra*, p. 27; and see *Hartley* v. *Rochdale Corporation* [1908] 2 K. B. 594.

action for damages. The matter is very fully discussed by Sir Frederick Pollock (see his book, 11th ed. pp. 136—148), and that learned author comes to the conclusion that in English, as in American, law, inevitable accident is a good excuse. "But although inevitable accident, or, as it is sometimes called, the act of God, is an answer when the different rights are co-ordinated by the common law, yet some of those rights which co-exist at common law may, by the express language of some statute, be subordinated to others. In such a case, the words of the statute must receive their natural construction; and, if it appears clear that a liability is imposed, even for the result of inevitable accident, the Courts cannot introduce any exception thereto by intendment of law" (*l*). This is always a matter of construction, and, where the exception would work injustice, the intention of the statute must very clearly appear (*m*).

2. Exercise of common rights.

If a man be injured by the lawful exercise of another's ordinary rights, he has

(*l*) Addison on Torts, 8th ed. p. 20.

(*m*) *River Wear Commissioners* v. *Adamson* [1877] L. R. 2 App. Cas. 743.

no action; and it is immaterial whether the exercise of such rights is prompted by a malicious motive (*n*). In the words of Lord Herschell in the House of Lords in the important case of *Allen* v. *Flood* (*o*), "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action." Thus, though a man be utterly ruined by his enemy establishing a rival shop across the road, which is carried on at a loss solely to pay off an old grudge, yet he is totally without remedy (*p*). But the defendant must keep well within his rights. Thus, in the case cited, "if a man should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars" (*q*). Trade competi-

(*n*) Per Lords Watson and Macnaghten, in *Mayor of Bradford* v. *Pickles* [1895] A. C. at pp. 598, 601. See also *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A. C. p. 25; *Davis* v. *Bromley Corporation* [1908] 1 K. B. 170; *Wolstenholme* v. *Ariss* [1920] 2 Ch. 403.

(*o*) [1898] A. C. at p. 135. See also the judgment of Lord Macnaghten in *Quinn* v. *Leathem* [1901] A. C. at pp. 508, 509.

(*p*) See *The Gloucester Grammar School case* [1410, 1411] Y. B. 11 Hen. 4, fol. 47, pl. 21.

(*q*) Per Holt, C.J., in *Keeble* v. *Hickeringill* [1809] 11 East, 576, n. See also the cases of *Chasemore* v. *Richards* (*infra*, p. 76) and *Acton* v. *Blundell* [1843] 12 M. & W. 324.

tion, even though it is carried to an extreme length and causes damage to the plaintiff, is not actionable, provided that the defendant has acted solely with the lawful object of obtaining success in trade, and has used no unlawful means (*r*).

III. Sufferer disentitled.

1. **Leave and licence. Volenti non fit injuria. No action is maintainable for damage arising from acts suffered by consent, if such acts were not likely nor intended to cause bodily harm.** Thus, boxing with padded gloves is lawful, but not fighting with the naked fist; football, because no hurt worth speaking of is likely, but not a kicking match (*s*). But a man may consent to the infliction of bodily harm on himself for some just cause, as, *e.g.*, to a surgical operation. It must always be remembered that mere knowledge is not enough. There must be consent. The maxim is "*volenti* non fit injuria," not "scienti non fit injuria" (*t*).

(*r*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1889] 23 Q. B. D. at pp. 613, 614; [1892] A. C. at pp. 40—44, 59.
(*s*) *Reg.* v. *Coney* [1882] 8 Q. B. D., per Cave, J., at p. 539, and per Stephen, J., at p. 549.
(*t*) *Smith* v. *Baker* [1891] A. C. 325.

2. **Self-defence.** Defence of one's own person (*u*), property (*x*), or possession (*y*) is an excuse; but the force employed must not be out of proportion to the apparent urgency of the occasion. It must not exceed what an average reasonable man in a similar position would believe to be necessary; *e.g.*, it is not justifiable to use a deadly weapon to defend oneself from a blow with the hand (*z*).

3. **Acts done of necessity to avoid a greater harm**; *e.g.*, pulling down houses to stop a fire is no doubt excusable (*a*).

(*u*) *Dale* v. *Wood* [1822] 7 Moore, C. P. 33.
(*x*) *Scott* v. *Shepherd* [1773] 2 W. Bl. 892; and see *infra*.
(*y*) *Roberts* v. *Taylor* [1845] 1 C. B. 126, 127.
(*z*) *Reece* v. *Taylor* [1835] 4 N. & M. 469.
(*a*) *Maleverer* v. *Spink* [1538] Dyer, 35 *b*, 36 *b*; but see *Carter* v. *Thomas* [1893] 1 Q. B. 673, discussed in *Cope* v. *Sharpe* [1910] 1 K. B. 168; and see *Cope* v. *Sharpe* (No. 2) [1912] 1 K. B. 496; and *Greyvensteyn* v. *Hattinge* [1911] A. C. 355.

CHAPTER IV.

OF LIABILITY FOR THE WRONGS OF OTHERS.

A person is liable for a wrongful act (*a*), **both where he himself has done the act and where he has distinctly authorized it** (*b*). As regards ratification, however, only such acts bind a principal by subsequent ratification as were professedly done at the time on the principal's behalf (*c*). "What is done by the immediate actor on his own account cannot be effectually adopted by another, neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by John" (*d*). But what if the party charged says he is acting as the agent or servant of another? In *Cullen* v. *Thomson's Trustees* (*e*) the managers of a joint-stock com-

(*a*) "Act" is used to include "omission."

(*b*) *National Phonograph Co.* v. *Edison Bell, &c., Co.* [1908] 1 Ch. 335 (C. A.); *Samson* v. *Aitchison* [1912] A. C. 844.

(*c*) *Wilson* v. *Tumman* [1843] 6 M. & G. 236; *Keighley* v. *Durant* [1901] A. C. 240; *Barne* v. *St. Mary, Islington* [1912] 76 J. P. 12; *Becker* v. *Riebold* [1913] 30 T. L. R. 142.

(*d*) Pollock, 11th ed. pp. 75, 76.

(*e*) [1862] 4 Macqueen's Scotch App. 424.

pany were held personally liable for fraudulent statements, and were not allowed to excuse themselves on the ground that they had acted as the servants or agents of the directors in making such statements; and Lord Westbury, L.C., said, "all persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for the contract of agency or service cannot impose any obligation on the agent or servant to commit, or assist in the committing of, fraud." And this is equally true of all wrongs besides fraud. But where a person is not the servant or agent of the person sued for a tort committed by the former, the latter is not liable (*f*).

An agent may be liable for his principal's torts although acting quite *bonâ fide* if he impliedly contracts with the third party to indemnify him. Thus, where a stockbroker *bonâ fide* prepared a transfer under circumstances which were held to bind him to a warranty that the person transferring was the person registered as holder, he was held liable for any loss arising from the transfer being forged (*g*).

(*f*) *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K. B. 820 (C. A.).

(*g*) *Sheffield Corporation* v. *Barclay* [1905] A. C. 392; *Bank of England* v. *Cutler* [1908] 2 K. B. 208 (C. A.); but see *Hindle* v. *Brown* [1908] 98 L. T. 791.

Liability of a master for the wrongful acts or omissions of his servants.—A master is responsible for the wrongful acts or omissions of his servant committed in the course of his employment, whether the wrong be committed negligently, wantonly, or even wilfully, and though no express command or privity of the master be proved (*h*).

This is the general rule: we have thus two points to consider: **I. What is "the course of the employment"? and II. Who is to be deemed a servant?** Of these in their order:—

I. What is "the course of the employment"?

In *Limpus* v. *London General Omnibus Co.* (*i*), the driver of defendants' omnibus drove it across the road in front of plaintiff's rival omnibus, which was thereby overturned. The defendants had expressly forbidden their drivers to obstruct any omnibus, but, notwithstanding, inasmuch as the act done by the driver was within the scope of his authority it was held that the defendants were liable.

(*h*) *E. London Harbour Bd.* v. *Caledonia Landing, &c., Co.* [1908] A. C. 271; *Refuge Ass. Co.* v. *Kettlewell* [1908] 1 K. B. 645; [1909] A. C. 243; *Lambert* v. *G. E. R.* [1909] 2 K. B. 776; cf. *Baker* v. *Snell* [1908] 2 K. B. 825; *Malcolm* v. *Waterhouse* [1908] 24 T. L. R. 854.

(*i*) [1862] 32 L. J. Ex. 34; cf. *Ricketts* v. *Tilling* [1915] 1 K. B. 644; and see *Lloyd* v. *Grace, Smith & Co.* [1912] A. C. 716, *infra*, p. 41.

In *Poulton* v. *L. & S. W. Railway Co.* (*k*), a station-master having demanded payment for the carriage of a horse conveyed by defendant company, arrested and detained plaintiff for non-payment thereof until it was ascertained by telegraph that all was right. The railway company had no power to arrest for non-payment of carriage. Therefore, the station-master, in arresting plaintiff, did an act which was wholly illegal, not merely in the mode of doing it, but in the doing it at all. Held, the railway company were not liable; and Blackburn, J., distinguished this case from *Limpus* v. *London General Omnibus Co.*, pointing out that there "the act done by the driver was within the scope of his authority, though, no doubt, it was a wrongful and improper act, and therefore his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act. Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all,

(*k*) [1867] L. R. 2 Q. B. 534. Compare *Whittaker* v. *London C. C.* [1915] 2 K. B. 676, with *Ormiston* v. *G. W. R.* [1917] 1 K. B. 598.

has it against the station-master personally, but not against the railway company" (*l*).

In *Abrahams* v. *Deakin* (*m*), the plaintiff had offered the defendant's barman a ten-mark piece, and as it was refused, gave a half-sovereign in its place, for which he received change. Subsequently the manager of defendant's bar followed the plaintiff and gave him in charge for attempting to pass bad money. Held, that defendant was not liable, for the manager had no implied authority to arrest the plaintiff as the defendant's property was no longer in danger, and the arrest was made only in order to vindicate the law by punishing plaintiff for a criminal offence which he was supposed to have already committed.

Notice four cases on the liability of a railway company for the acts of its servants, two in which the company were held liable, two in which they were not.

Company held liable:—

Bayley v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (*n*): Porter pulls plaintiff out of carriage, thinking he was in the

(*l*) [1862] L. R. 2 Q. B. p. 540. Cf. *Compton-Smith* v. *L. & S. W. Ry. Co.*, Times Newspaper, May 29th, 1897; Regulation of Railways Act, 1889, s. 5; and *Denaby, &c., Collieries* v. *Yorkshire Miners' Assn.* [1906] A. C. 384.

(*m*) [1891] 1 Q. B. 516 (C. A.). See also *Hanson* v. *Waller* [1901] Q. B. 390, and *Sanderson* v. *Collins* [1904] 1 K. B. 628, distinguishing *Coupé Co.* v. *Maddick* (1891) 2 Q. B. 413 (where the liability was in contract).

(*n*) [1872, 1873] L. R. 7 C. P. 415.

wrong train. Company held liable, on the ground that porter was acting within his general authority. *Goff* v. *G. N. Railway Co.* (*o*): Company held liable for arrest of plaintiff by mistake of company's servants, servants having authority to arrest for non-payment of fare.

Company not liable:—

Allen v. *L. & S. W. Railway Co.* (*p*): Company's booking-clerk gave into custody a person suspected of robbing the till, after the attempt had ceased. Held, there was no implied authority for the act, and therefore the company was not liable. *Edwards* v. *L. & N. W. Railway Co.* (*q*): Defendant company's servant in charge of station arrests plaintiff on suspicion of having stolen company's goods. Company held not liable, servant's act being plainly beyond his authority and not part of the company's general business.

The master, then, is liable for the wrongs of his servant committed in the course of his employment, and these may include wrongs resulting from the servant's disobedience to

(*o*) [1870] L. R. 6 Q. B. 65; *Whittaker* v. *L. C. C.* [1915] 2 K. B. 676.

(*p*) [1861] 3 E. & E. 672.

(*q*) [1870] L. R. 5 C. P. 445. See also *Bank of New South Wales* v. *Owston* [1879] 4 App. Cas. 270, 277.

positive commands. In *Whatman* v. *Pearson* (*r*), a contractor forbade his workmen to leave their horses, or to go home during the dinner hour. Owing to disregard of this order, a horse which was left unattended ran away, and injured plaintiff's railings. The master was held responsible, on the ground that the workman was acting within the general scope of his authority to conduct the horse and cart during the day. On the other hand, where the enterprise is entirely the servant's, so that he may be said to be out "on a frolic of his own" (*s*), the master is not liable. In *Storey* v. *Ashton* (*t*), a carman, while out on his employer's business, at the request of a fellow-servant, went out of his way to fetch something for the latter. While so doing, he ran over the plaintiff. Upon these facts the master was held not liable.

The employer is liable for the **frauds** of his servant committed without his authority, but in the course of his service (*u*).

(*r*) [1868] L. R. 3 C. P. 422. See also *Englehart* v. *Farrant & Co.* [1897] 1 Q. B. 240, and cf. *Limpus* v. *London General Omnibus Co.*, *supra*, p. 36; *Ricketts* v. *Tilling*, *supra*, p. 36.

(*s*) Per Parke, B., in *Joel* v. *Morrison* [1834] 6 C. P. 501; and see *Rand* v. *Craig* [1919] 1 Ch. 1.

(*t*) [1869] L. R. 4 Q. B. 476. See also *Rayner* v. *Mitchell* [1877] 2 C. P. D. 357; *Sanderson* v. *Collins* [1904] 1 K. B. 628; *Cheshire* v. *Bailey* [1905] 1 K. B. 237; and compare *Stevens* v. *Woodward* [1881] 6 Q. B. D. 318, with *Ruddiman* v. *Smith* [1889] 60 L. T. 708.

(*u*) Per cur. in *Barwick* v. *English Joint Stock Bank* [1867] L. R. 2 Ex. at p. 265; *Houldsworth* v. *City of Glasgow Bank*

The cases have been recently reviewed by the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (*y*), and it is now settled that, if the fraud is committed by a servant without his employer's knowledge but within the general scope of his employment, then the employer is liable even if the servant's sole intention was to benefit himself. But an employer is not liable where the servant has used his position to effect the fraud but had no authority, express or implied, to do the acts in question, as was the case in *Farquharson* v. *King* (*z*).

Where an accident occurred through the negligence of a person who was servant of both parties, the defendant was held liable because at the time the servant was so negligent he was only acting as the defendant's servant (*a*).

II. Who is to be deemed a servant?

As stated above (*b*), a man is liable for the wrongs of his servants committed in the course of

[1880] 5 App. Cas. 317; *Refuge Assurance Co.* v. *Kettlewell* [1908] 1 K. B. 545; [1909] A. C. 243.

(*y*) [1912] A. C. 716, disapproving the dicta of Bowen, L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* [1887] 18 Q. B. D. at p. 718, and of Lord Davey in *Ruben* v. *Gt. Fingall Consolidated* [1906] A. C. at p. 445, and explaining the dictum of the Court in *Barwick* v. *English Joint Stock Bank*, *supra*.

(*z*) [1902] A. C. 325; see also *Anglo-American Oil Co.* v. *Manning* [1908] 1 K. B. 536.

(*a*) *The Egyptian* [1910] A. C. 400.

(*b*) P. 36.

their employment, but as a general rule (*c*) he is not liable for the wrongs of an independent contractor employed by him.

What, then, is an **independent contractor**, as distinguished from a **servant?** An **independent contractor** is **one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result.** A **servant,** on the other hand, **is under the order and control of his master in respect of the means and methods used to attain the end for which he is employed** (*d*). In order to ascertain whether A. was B.'s servant the following questions are material: (1) Did B. engage A.? (2) Did B. pay A. his wages? (3) Could B. discharge A.? (4) Did B. give A. his orders? (*e*).

A person employing an independent contractor is not generally responsible for the wrongful acts or omissions of the contractor. In *Quarman* v.

(*c*) For the exceptions see *infra*, pp. 44—46.

(*d*) See the judgment of Crompton, J., in *Sadler* v. *Henlock* [1835] 4 E. & B. 570, 578; and also *Johnson* v. *Lindsay* [1889] 23 Q. B. D. 608 (C. A.); *Donovan* v. *Laing, &c. Syndicate* [1893] 1 Q. B. 629 (C. A.); *Rex* v. *Solomons* [1909] 2 K. B. 980; but see *Doggett* v. *Waterloo Taxi-Cab Co.* [1910] 2 K. B. 336; and Pollock, 11th ed. p. 80. A consulting surgeon at a hospital is not a servant of the governors: *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K. B. 820; but a harbour master is the servant of the harbour board: *E. London, &c., Bd.* v. *Caledonian Landing, &c., Co.* [1908] A. C 271; *The Bien* [1910] 27 T. L. R. 9.

(*e*) See the observations of Bramwell, L.J., in *Swainson* v *N. E. Ry. Co.* [1878] 47 L. J. Q. B. at p. 375.

Burnett (*f*), the defendants hired horses and a coachman from C. and provided their own carriage and livery for the coachman, who received regular wages from C., and two shillings a week from the defendants. Owing to the coachman's negligence in leaving the carriage, the horse bolted, and the plaintiff was injured. The defendants were held not liable, as the coachman was not their servant, but the servant of C., an independent contractor.

In *Reedie* v. *L. & N. W. Railway Co.* (*g*), the defendant company agreed with certain contractors for the construction of the line; the company to have the general right of superintending the work, and the power of dismissing incompetent workmen. Owing to the negligence of the contractors' workman, plaintiff's husband was killed, and this was an action under Lord Campbell's Act (*h*), against the company. Held, the company was not liable, as the workman was not their servant, but the servant of the independent contractors.

But the person employing the contractor is liable (*i*) **in five cases.**

(*f*) [1840] 6 M. & W. 499; see also *Jones* v. *Mayor of Liverpool* [1885] 14 Q. B. D. 890; *Jones* v. *Scullard* [1898] 2 Q. B. 565.

(*g*) [1849] 4 Exch. 244.

(*h*) 9 & 10 Vict. c. 93.

(*i*) He may have a right to recover from the contractor the damages awarded against him: *Birmingham City Tramways* v. *Law* [1910] 2 K. B. 965.

1. **When he personally interferes in the contractor's work.** In *Burgess* v. *Gray* (*j*), a contractor, employed by defendant to make a drain, left a heap of gravel by the roadside. Defendant paid a navvy to cart it away. This was not properly done, and plaintiff was consequently upset as he was driving home. Held, that the defendant was liable.
2. **When the thing contracted to be done is unlawful.** In *Ellis* v. *Sheffield Gas Consumers' Co.* (*k*), the defendant company, without the necessary special powers, employed a contractor to open trenches in the streets of Sheffield. Plaintiff was injured by falling over a heap of stones left by the contractor. The company was held liable for the contractor's wrongful act.
3. **When the thing contracted to be done, though lawful in itself, will naturally be attended by injurious consequences, unless effectually guarded against.** In *Bower* v. *Peate* (*l*) defendant employed a contractor to pull down an old house and erect a new one. The contractor expressly undertook

(*j*) [1845] 1 C. B. 578.
(*k*) [1853] 23 L. J. Q. B. 42.
(*l*) [1876] 1 Q. B. D. 321; and see *Odell* v. *Cleveland Ho.* [1910] 102 L. T. 602.

to support plaintiff's house, and to be liable for all damage, but defendant was held liable for the damage done. In *Hughes* v. *Percival* (*m*), defendant employed a contractor to rebuild a house. The contractor's servants, in so doing, cut through a party-wall and injured plaintiff's house. Defendant was held liable on the ground that the building operations in question were dangerous to plaintiff's house. **On the other hand, the person employing the contractor is not liable when the thing contracted to be done is lawful, and not necessarily dangerous** (*n*). Thus he is not liable for merely casual or collateral negligence on the part of the contractor's workmen, but only for damage caused by failure to take proper precautions in doing the work (*o*).

4. **When there is a statutory obligation to do the thing properly.** In *Hole* v. *Sittingbourne Railway Co.* (*p*), the defendant

(*m*) [1883] L. R. 8 App. Cas. 443. See also *Black* v. *Christchurch Finance Co.* [1894] A. C. 48; *Hardaker* v. *Idle District Council* [1896] 1 Q. B. 335; *Penny* v. *Wimbledon U. D. C.* [1899] 2 Q. B. 72; *Holliday* v. *National Telephone Co. ibid.*, 392; *Maxwell* v. *British Thompson Houston Co.* [1902] 18 T. L. R. 278; *Hurlstone* v. *London Electric Railways* [1914] 30 T. L. R. 398.

(*n*) *Butler* v. *Hunter* [1862] 31 L. J. Ex. 214; *Wilson* v. *Hodgson* [1916] 85 L. J. K. B. 270.

(*o*) *Penny* v. *Wimbledon U. D. C.*, *supra.*

(*p*) [1861] 6 H. & N. 488.

company was authorized by statute to make an opening bridge over a navigable river. A contractor employed by the company made a bridge which would not open, and plaintiff's vessel was thereby prevented from navigating the river. The company was held liable.

5. **In cases under sect. 4 of the Workmen's Compensation Act, 1906,** which provides that where the "principal," as therein defined, employs a contractor, such contractor's servants are to be able to recover compensation under the Act from the "principal" without prejudice, however, to the "principal's" right to be indemnified by the contractor, if the contractor is himself liable under the Act (*r*).

Liability of master to servant for injuries incurred by servant during service.

It will be convenient to consider this subject under three heads, viz.:—(1) The liability of the master at common law; (2) his liability under the Employers' Liability Act, 1880; (3) his liability under the Workmen's Compensation Act, 1906.

As will hereafter be seen, neither the Employers' Liability Act nor the Workmen's

(*r*) *Cooper & Crane* v. *Wright* [1902] A. C. 302.

Compensation Act applies to servants of all kinds, but the definition of "workman" in the Workmen's Compensation Act, 1906, is different from, and very much wider than, that in the Employers' Liability Act. The Workmen's Compensation Act does not repeal or amend the Employers' Liability Act, 1880, but is generally found a more valuable and convenient remedy.

1. **At common law** the master was only bound—
   1. To take care to provide competent fellow-servants (*s*);
   2. To take care to provide safe and efficient machinery, or, as it has been put, to take reasonable precautions to ensure his servants' safety (*t*);
   3. Not to be guilty of personal negligence (*u*).

The mere relation of master and servant does not imply any agreement on the part of the master to warrant the servant against risks incidental to the employment. Thus, in *Priestley* v. *Fowler* (*x*), defendant's servant, whose thigh

(*s*) See the observations of Scrutton, L.J., in *Cole* v. *De Trafford* [1918] 2 K. B. at p. 535.

(*t*) Bankes, L.J., seems to have treated this sub-head as coming within the next sub-head, see his judgment in *Cole* v. *De Trafford* [1918] 2 K. B. at p. 532, and the judgment of Scrutton, L.J., at pp. 534—536.

(*u*) *Williams* v. *Birmingham Battery Co.* [1899] 2 Q. B. 338; *Cole* v. *De Trafford* [1918] 2 K. B. 523 If a servant is missing, the master is under no duty to search for him. If, therefore, he dies, in consequence, the master is not liable: *Bond* v. *Wilson* [1908] 24 T. L. R. 238.

(*x*) [1837] 3 M. & W. 1.

was fractured owing to the overloading of a cart in the charge of another servant, was held disentitled to recover damages. On the other hand, in *Mellors* v. *Shaw* (*y*), plaintiff, a miner, succeeded in an action against his masters for injuries caused by the unsafe condition of the mine; but there the plaintiff proved that the defendant knew of such unsafe condition.

This is a rule of the common law, but the first decision upon the point was in 1837, in *Priestley* v. *Fowler* (*supra*); and in 1868, in *Wilson* v. *Merry* (*z*), it was held to extend to injuries caused to a workman by a foreman or person occupying a position of superintendence in the same employment.

Independently, therefore, of the statutory law on the subject, the position of a workman who has sustained personal injuries in the course of his employment is inferior to that of a stranger (*a*). For at common law it is open to the employer in any action brought against him by the workman not only to set up every defence which would be available against anyone not in his employment, but, in addition, where the injury was caused by the negligence of a fellow-servant of the workman, the employer can set up the so-called

(*y*) [1861] 30 L. J. Q. B. 333.

(*z*) [1868] L. R. 1 Sc. & D. 326.

(*a*) See the remarks of Scrutton, L.J., in *Cole* v. *De Trafford* [1918] 2 K. B. at p. 537, comparing the rights of an employee and an "invitee."

defence of "**common employment**" since the workman, in entering the employment, is presumed to have accepted this kind of risk (*b*).

Common employment is no defence when the action arises from a breach of statutory duty (*c*). Thus a railway company was held liable to an employee for injuries caused by the negligence of a fellow-employee, as the company were under a statutory duty to engage persons with particular qualifications and the negligent employee in question did not possess them (*d*).

A person who volunteers to assist servants engaged in their work becomes their fellow-servant so far as an action for personal injuries is concerned (*e*); but where a person aids the servants of another with such other's consent or acquiescence, not as a mere volunteer, but for the purpose of expediting some business of his own, he is not deemed a servant, and so can recover (*f*).

(*b*) *Coldrick* v. *Partridge* [1910] A. C. 77; *Waldron* v. *Junior Army and Navy Stores* [1910] 2 Ir. R. 381; but see *Britannic Merthyr Coal Co.* v. *David* [1910] A. C. 74. The mere fact that the workman is an infant does not prevent the defence of common employment being an answer to his claim: *Heasmer* v. *Pickfords* [1920] 36 T. L. R. 818.

(*c*) *Butler* v. *Fife Coal Co.* [1912] A. C. 149; *Watkins* v. *Naval Colliery Co.* [1912] A. C. 693.

(*d*) *Jones* v. *Canadian Pacific Ry. Co.* [1913] 83 L. J. P. C. 13.

(*e*) *Degg* v. *Midland Ry. Co.* [1857] 1 H. & N. 773; *Bass* v. *Hendon U. D. C.* [1912] 28 T. L. R. 317.

(*f*) *Wright* v. *L. & N. W. Ry. Co.* [1876] 1 Q. B. D. 252; *Hayward* v. *Drury Lane* [1917] 2 K. B. 899.

2. Employers' Liability Act, 1880 (*g*).

This Act was mainly directed against the defence of "common employment," and in cases to which it applies the effect of it is to place the workman in the same position as that of a stranger.

By its provisions any railway servant, or any person to whom the Employers and Workmen Act of 1875 applies—*i.e.*, any labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or person otherwise engaged in manual labour (not being a domestic or menial servant, or a seaman (*h*))—and the persons entitled in case of death of any such railway servant or person, are to have the same rights and remedies against the employer as if such railway servant or person had not been in his service, for any personal injury caused by any of the following reasons:—

(i) **By reason of any defect in the condition of the ways, works, machinery, or plant,** used in the employer's business, which defect was caused or remained undiscovered through the negligence of the employer, or of some person in his service

(*g*) 43 & 44 Vict. c. 42.

(*h*) This word has not the same meaning as the word "seaman" in the Merchant Shipping Acts: *Macbeth* v. *Chislett* [1910] A. C. 220.

whose duty it was to see to the condition of such things.

This applies when the defect arises either from original fault of the works, &c., or from want of repair (*i*). It also applies when sound plant is unfit for the use to which it is put (*k*). A machine need not be in actual use to come within the Act (*l*).

(ii) By reason of the negligence of a person in the service who had any superintendence entrusted to him whilst in the exercise of such superintendence. Such person must be one whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. But a man may be in the exercise of superintendence though at the time voluntarily assisting in manual labour (*m*).

(iii) By reason of the negligence of a person in the service to whose orders the injured workman is, at the time of the injury, bound to conform, where the injury results from so conforming.

(iv) By reason of the act or omission of any person in the service done or made in

(*i*) *Heske* v. *Samuelson* [1883] 12 Q. B. D. 30.
(*k*) *Cripps* v. *Judge* [1884] 13 Q. B. D. 583.
(*l*) *Thompson* v. *City Glass Bottle Co.* [1902] 1 K. B. 233.
(*m*) *Osborne* v. *Jackson* [1883] 11 Q. B. D. 619.

obedience to the rules or bye-laws of the employer, or in obedience to particular instructions of the employer, or of some person duly delegated by him in that behalf, where the injury results from some impropriety or defect in the rules, bye-laws, or instructions. But no bye-law is to be deemed defective which shall have been approved as proper by any department of Government under any Act of Parliament.

(v) **By reason of the negligence of a person in the service having the charge or control of any signal, points, locomotive engine, or train upon a railway.** This has been held applicable to a private railway (*n*).

Provided that in each of the above cases the workman injured cannot recover if he knew of the defect or negligence, and did not complain to the employer or some person superior to himself in the service, within a reasonable time, unless he was aware that the employer, or such superior, already knew of the said defect or negligence.

In *Thomas* v. *Quartermaine* (*o*), the plaintiff fell into an insufficiently-fenced cooling vat at the defendant's, his employer's, brewery. The jury found that both plaintiff and defendant knew of the defect. It was thereupon held by Bowen and Fry, L.JJ. (Lord Esher, M.R.,

(*n*) *Doughty* v. *Firbank* [1883] 10 Q. B. D. 358.
(*o*) [1886] 17 Q. B. D. 414; [1887] 18 Q. B. D. 685 (C. A.).

dissentiente), that the maxim "*volenti non fit injuria*" applied, and therefore the plaintiff could not recover. This case was further discussed and explained in *Yarmouth* v. *France* (*p*), where it was laid down "that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. But the mere fact that the plaintiff knew of the danger, and yet incurred it, is not conclusive" (*q*). It is important to notice that the maxim is not "*scienti non fit injuria*" but "*volenti non fit injuria.*" "Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim '*volenti non fit injuria*'" (*r*). Finally, it must be noticed that this interpretation of the law was expressly approved by the House of Lords in the case of *Smith* v. *Baker* (*s*). But in *Baddeley* v. *Earl Granville* (*t*) it was held that the maxim does not

(*p*) [1887] 19 Q. B. D. 647.

(*q*) Per Lindley, L.J., at p. 659.

(*r*) Per Esher, M.R., at p. 657. See also Lord Herschell's judgment in *Membery* v. *G. W. Rail. Co.* [1889] 14 App. Cas. 179, 190.

(*s*) [1891] A. C. 325; and see *Britannic Merthyr Coal Co.* v. *David* [1910] A. C. 74.

(*t*) [1887] 19 Q. B. D. 423; cf. *Davies* v. *Owen* [1919] 2 K. B. 39.

apply where the defendant has been guilty of a breach of duty imposed by statute. If the injury result in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of action as the workman himself would have had—*i.e.*, the right of action given by Lord Campbell's Act (*u*) and the Act amending it (*x*).

The amount of damages recoverable is limited to a sum equal to the estimated earnings of a person in the grade, employment, and district of the person injured, during the three years immediately preceding the injury. "Section 3 of the Employers' Liability Act does not give a measure of damages, but the limit of maximum damages which may be awarded under that Act" (*y*).

If a penalty is payable under some other Act it must be deducted from the compensation, and it cannot be sued for if compensation has been awarded under this Act (*z*).

Notice of the injury must be given to the employer within six weeks. The action must be commenced within six months, and in the case of death within twelve months. But in the case of death, want of notice is immaterial if the judge thinks there is reasonable ground for not giving

(*u*) 9 & 10 Vict. c. 93. See pp. 234—237, *infra*.
(*x*) 27 & 28 Vict. c. 95. See p. 235, *infra*.
(*y*) Per Cave, J., in *Borlick* v. *Head* [1885] 34 W. R. 102.
(*z*) Employers' Liability Act, 1880, s. 5.

it. The notice (which must be in writing (*a*) though not necessarily in technical language (*b*)) must give the name and address of the party injured, and state in ordinary language the cause and date of the injury; and it must be served by delivering it at the place of business, or at the residence, of the employer or by sending it in a registered letter properly addressed to the employer at such place as aforesaid, or at his last-known place of business or residence. Defects or inaccuracy do not render the notice invalid, unless the judge believe (1) that the defendant is thereby prejudiced in his defence, and (2) that the defect or inaccuracy was for the purpose of misleading (*c*).

Actions under the Act must be brought in the County Court, but may be removed into a superior Court on the application of either party in the usual manner. Removal, however, will only be ordered under very exceptional circumstances (*d*).

A workman can contract himself out of the Act (*e*), and such a contract is a bar to any claim under Lord Campbell's Act.

The operation of the Employers' Liability Act, 1880, has been extended from year to year since

(*a*) *Moyle* v. *Jenkins* [1881] 8 Q. B. D. 116.
(*b*) *Stone* v. *Hyde* [1882] 9 Q. B. D. 76.
(*c*) *Carter* v. *Drysdale* [1883] 12 Q. B. D. 91.
(*d*) *Munday* v. *Thames Iron Works Co.* [1882] 10 Q. B. D. 59.
(*e*) *Griffiths* v. *Lord Dudley* [1882] 9 Q. B. D. 357.

the time when it would have originally expired in 1887.

3. Workmen's Compensation Acts.

The Act of 1906 repealed the Workmen's Compensation Acts, 1897 and 1900. It has, however, retained the radical changes introduced by these Acts, and has greatly extended their operation. The workman who comes within the Act is in a far more favourable position than a stranger. Three of the principal defences open to employers before 1898 are abolished in cases coming under the Act, for where a workman sues his employer for injuries sustained by an accident "arising out of and in the course of his employment" the latter cannot set up as a defence (i) "*volenti non fit injuria*" (*f*) or (ii) inevitable accident (*g*) or (iii) contributory negligence of the workman (*h*). Even the defence of "serious and wilful misconduct" allowed by the repealed Acts of 1897 and 1900 has been considerably curtailed. The Act of 1906 has since been amended as to details.

(*f*) See pp. 32, 53, *supra*.
(*g*) See pp. 29, 30, *supra*.
(*h*) See pp. 213—215, *infra*.

CHAPTER V.

OF WRONGS TO PROPERTY.

A. Of Wrongs to Real Property.

Trespass is the wrongful and unwarrantable entry upon the soil or land of another person.

The essential to constitute trespass is therefore **entry,** which may be either **actual** or **constructive.**

Constructive entry may be roughly described as every interference with the land of another—*e.g.*, throwing rubbish or pouring water on your neighbour's land.

Neither force nor unlawful intention, nor actual damage, nor the breaking of an inclosure, is necessary to constitute a trespass.

Besides bringing an action for damages, the person whose land is trespassed upon may—

1. Forcibly defend his possession against a trespasser;
2. Forcibly eject him.

In neither case, however, must unnecessary violence be used.

To maintain an action for trespass, plaintiff must prove that at the time the wrong was committed he had **possession,** which may be **actual** or **constructive.**

Constructive Possession means either the possession of an agent or servant, or an immediate right to possess, or possession conferred by law in certain cases independently of any physical apprehension or transfer (*a*). By means of the doctrine of constructive possession the strictly possessory remedies were largely extended in favour of owners not themselves in actual possession.

The actual occupier of real property is always entitled to maintain an action for trespass thereon. On the other hand, the owner who has parted with possession in favour of a tenant or lessee, cannot maintain an action for trespass (*b*); he is, however, entitled to bring an action for injury done to his reversionary estate, provided that such injury is of a **permanent** nature, and deteriorates the marketable value of

(*a*) *Smith* v. *Milles* [1786] 1 T. R. 480; cf. *Glynn* v. *Howell* [1902] 1 Ch. 666. See also Pollock, 11th ed. p. 349, note (*m*); and upon the whole of this difficult and complicated subject, see "An Essay on Possession in the Common Law," by Sir Frederick Pollock and the late Mr. Justice Wright.

(*b*) *Baxter* v. *Taylor* [1832] 4 B. & Ad. 72; *Mayfair Property Co.* v. *Johnston* [1894] 1 Ch. 508.

the property (*c*). In such cases the tenant is entitled to sue in respect of the immediate injury, and the reversioner in respect of the diminished saleable value of the reversion.

Where a person who has a limited right of entry upon lands exceeds that right, he is a trespasser. The right of the public to use a highway is such a limited right. "The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or her rights of trespass therein, as, for instance, by permitting cattle to depasture thereon" (*d*) or by using the soil of the highway for the purpose of interfering with the exercise by the owner of the adjoining land of his legal right of sporting over such land (*e*) or of prying into his occupations (*f*). But the mere fact that a meeting is being held on a public

(*c*) *Tucker* v. *Newman* [1839] 11 A. & E. 40. This, under the old system of pleading, would have been an action on the case.

(*d*) Per Lopes, L.J., in *Harrison* v. *Duke of Rutland* [1893] 1 Q. B. at p. 152; and cf. *Fitzhardinge* (*Lord*) v. *Purcell* [1908] 2 Ch. 139; *Brighton Corporation* v. *Packham* [1908] 72 J. P. 318.

(*e*) *Harrison* v. *Duke of Rutland* [1893] 1 Q. B. 142. The same rule applies to navigation in a harbour: *Denaby, &c., Collieries* v. *Anson* [1911] 1 K. B. 171.

(*f*) *Hickman* v. *Massey* [1900] 1 Q. B. 752.

highway is not of itself sufficient to make the meeting unlawful (*g*).

The defences to an action for trespass are:—

1. **On the ground of necessity,** *e.g.*, to escape some pressing danger (*h*).
2. **Leave and licence,** by implied invitation, as entering a shop or inn.
3. **Liberum tenementum,** that it is the defendant's land. This raises the question of title. Therefore the action of trespass is a convenient method for trying the question of title to lands.
4. **By authority of law**—*e.g.*, entry to serve legal process, or to distrain (*i*).
5. **To re-take one's goods or cattle,** but entry is not justified by the mere fact that defendant's goods or cattle are there. It must be shown that they are there by plaintiff's act (*k*), or that they had been stolen from defendant.
6. **To abate a nuisance,** after notice (*l*).
7. **On the ground of some special property or easement.**

(*g*) *Burden* v. *Rigler* [1911] 1 K. B. 337.

(*h*) *Cope* v. *Sharpe* [1910] 1 K. B. 168; *Cope* v. *Sharpe* (*No.* 2) [1912] 1 K. B. 496, and see p. 33, *supra.*

(*i*) The fact that "peaceful picketing" was made lawful by the Trade Disputes Act, 1906, does not authorise entry upon private property: *Larkin* v. *Belfast Harbour Commrs.* [1908] 2 Ir. R. 214.

(*k*) See *Coaker* v. *Willcocks* [1911] 1 K. B. 649.

(*l*) See *infra*, p. 83.

But it is never a defence that the defendant trespassed innocently and without any intention of so doing (*m*).

Joint tenants, or tenants in common, can only sue one another in trespass when the act complained of is inconsistent with the complaining party's right—*e.g.*, carrying off the soil.

By the Limitation Act, 1623 (21 Jac. 1, c. 16) s. 3, actions for trespass must be brought within six years next after the cause of action arose.

Dispossession is wrongfully keeping possession of land from its rightful owner.

Former remedy—Action of ejectment.

Now by the Judicature Act, 1873—Action to recover the land. Plaintiff must recover by the strength of his own title, not by the weakness of his adversary's, *e.g.*, mere possession is *primâ facie* evidence of title until the claimant makes out a better one; or the defendant may plead **jus tertii**—*i.e.*, the right of a third person—but the claimant cannot assert *jus tertii* in support of his claim; possession being a good title against all except the true owner.

By the Real Property Limitation Act, 1874 (*n*) no action lies for the recovery of land or rent, unless brought within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom

(*m*) See *Clissold* v. *Crutchley* [1910] 2 K. B. 244 (C. A.).
(*n*) 37 & 38 Vict. c. 57, ss. 1, 9.

he claims. Where, however, the claimant or any person through whom he claims has been deprived of such land or rent by the concealed fraud of the person in possession, or any person through whom he claims, the statute does not begin to run until "the time when such fraud shall or with reasonable diligence might have been first known or discovered" (*o*). Claimants under the disability of infancy, coverture, or unsound mind, may bring their action within six years after such disability has ceased. But in no case can any such action be brought after thirty years, except in the case of concealed fraud. The statute provides that time may be prevented from running by acknowledgments in writing duly signed.

A lawful owner out of possession may peaceably enter, but must not use force. If he does so, although the entry may be a forcible entry within the Act 5 Richard II c. 18, s. 1, and therefore a criminal offence, he cannot be liable for a trespass on his own land. Consequently the only civil remedy of the person ejected is an action of assault if more than reasonable force is used (*p*).

(*o*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 26; *Gibbs* v. *Guild* [1882] 9 Q. B. D. 59; but see *Betjemann* v. *Betjemann* [1895] 2 Ch. 475.

(*p*) *Hemmings* v. *Stoke Poges Golf Club* [1920] 1 K. B. 720, and see Pollock, 11th ed., pp. 388—392.

To make a man a trespasser ab initio, two things must always concur:—

1. **There must be a misfeasance.**
2. **The rights infringed must be given by the law, and not by an individual.**

In *The Six Carpenters' Case* (*q*), six carpenters entered a London tavern, ordered and paid for wine, then ordered more which they did not pay for. Was their original entry rendered tortious by this refusal? No; for such refusal was a mere non-feasance. Notice that the reason why misfeasance does not make a man a trespasser *ab initio* when the authority is conferred by an individual is that such authority can be limited or recalled at will, whereas rights given by law require to be more strictly protected.

According to the above rule, a misfeasance in distraining would make a landlord a trespasser *ab initio*, which would obviously work great hardship. Therefore a remedial statute, **The Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 19,** provides that where a distress is made for rent justly due, and an irregularity afterwards occurs on the landlord's part, the distress is not on that account to be deemed unlawful, nor the person making it a trespasser *ab initio*.

The words on notice boards, "Trespassers will be prosecuted," are, "if strictly construed, a

(*q*) [1611] 1 Sm. L. C., 12th ed. p. 145.

wooden falsehood" (*r*), as trespass is not a crime, and were originally intended to secure costs under certain statutes, which provided that in actions for trespass, when less than 40s. was recovered, no more costs than damages should be allowed, unless the judge certified that the action was brought to try a right, or that the trespass was "wilful and malicious." Trespass after notice not to trespass on plaintiff's lands was held to be wilful and malicious, and special communication of such notice to defendant was not required (*s*).

When a person has been injured on the land of another, his position with regard to the question whether he can maintain an action in respect of such injuries will depend upon whether, at the time of his sustaining such injury, he was—

1. A trespasser;

2. A licensee; or

3. A person coming on lawful business.

"When a question arises . . . between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognised three categories of obligation . . . The lowest is the duty towards a **trespasser.** More care, though not

(*r*) Maitland's "Justice and Police" (English Citizen Series), p. 13.

(*s*) *Bowyer* v. *Cook* (1847), 4 C. B. 236.

much, is owed to a **licensee,** more again to an **invitee.** The latter term is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or material interest. Those who are invited as guests . . . are not in law invitees but licensees (*t*).

1. A trespasser cannot maintain an action where the "unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction" (*u*); *e.g.*, if he tumbles into a hole or unguarded pit, "he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct" (*v*). On the other hand, he can maintain an action where the unlawful act or conduct on his own part is not so connected with the harm suffered by him as to be part of the same transaction; *e.g.*, if, whilst he is trespassing, the owner of the land comes and knocks him down or assaults him without any provocation or excuse.

In *Ilott* v. *Wilkes* (*w*), it was held that a trespasser, with notice that spring-guns were set on the land he trespassed on, could not recover for injuries caused by such guns, on the ground that

(*t*) Per Hamilton, L.J., in *Latham* v. *Johnson* [1913] 1 K. B. at p. 410.

(*u*) Pollock, 11th ed. p. 177.

(*v*) Per Wilde, B., in *Bolch* v. *Smith* (1862), 7 H. & N. 736.

(*w*) [1820] 3 B. & Ald. 304; *Ponting* v. *Noakes* [1894] 2 Q. B. 281.

he voluntarily exposed himself to the mischief complained of. On the other hand, in *Bird* v. *Holbrook* (*x*), a trespasser wounded in similar circumstances, but without such notice, was held entitled to recover. In consequence of the former case, setting spring-guns except by night in a dwelling-house for the protection thereof was made a criminal offence by 7 & 8 Geo. 4, c. 18, now repealed and subsequently re-enacted by **24 & 25 Vict. c. 95, s. 1, and c. 100, s. 31.**

By the General Highway Act (*y*), s. 70, it is illegal to sink a pit, or erect a steam or other like engine, gin or machinery attached thereto, **within 25 yards** of a carriage or cartway, unless concealed so as to prevent danger. The same Act also prohibits the erection of windmills **within 50 yards,** of furnaces **within 15 yards,** and letting off fireworks **within 50 feet,** of a carriage or cartway. By the **Quarries Fencing Act, 1887** (*z*), s. 3, "where any quarry dangerous to the public is in open or unenclosed land, **within 50 yards** of a highway or place of public resort dedicated to the public, and is not separated therefrom by a secure and sufficient fence, it shall be kept reasonably fenced for the prevention of accidents, and unless so kept shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act,

(*x*) [1828] 4 Bing. 628.
(*y*) 5 & 6 Will. 4, c. 50.
(*z*) 50 & 51 Vict. c. 19.

1875." And by the **Barbed Wire Act, 1893** (*a*), s. 3 (1), "where there is on any land adjoining a highway within the county or district of a local authority a fence made with barbed wire, or in or on which barbed wire has been placed, and such barbed wire is a nuisance to such highway, it shall be lawful for such local authority to serve notice in writing upon the occupier of such land requiring him within a time therein stated (not to be less than one month nor more than six months after the date of the notice) to abate such nuisance"; and by sect. 3 (2), "if on the expiration of the time stated in the notice, the occupier shall have failed to comply therewith, it shall be lawful for the local authority to apply to a court of summary jurisdiction, and such court, if satisfied that the said barbed wire is a nuisance to such highway, may, by summary order, direct the occupier to abate such nuisance; and on his failure to comply with such order within a reasonable time, the local authority may do whatever may be necessary in execution of the order, and recover in a summary manner the expenses in connection therewith."

2. A licensee, *i.e.*, a person to whom the owner of certain property has given consent to do certain acts which, without passing any interest in the property, merely prevents such acts from being

(*a*) 56 & 57 Vict. c. 52.

wrongful, can **successfully maintain an action against his licensor, if the danger through which he sustained hurt was of a concealed character, which the licensor knew of and the licensee did not.** In the words of Willes, J., in *Gautret* v. *Egerton* (*b*), there must be something equivalent to laying a trap for the unwary licensee.

In *Southcote* v. *Stanley* (*c*), plaintiff, guest of defendant, was leaving defendant's house when a pane of glass fell from the door and cut him. Held, upon above grounds, defendant was not liable.

In *Lowery* v. *Walker* (*d*) the plaintiff was crossing a field in the occupation of defendant. He had no right there, except that the public used to make a short cut across the field, and the defendant, who knew it, took no steps to prevent the practice. Defendant without any warning put a savage horse in the field, which injured plaintiff. Held that plaintiff was a licensee, and

(*b*) [1867] L. R. 2 C. P. 371; and see *Corby* v. *Hill* [1858] 4 C. B. N. S. 556; *Hounsell* v. *Smyth* [1860] 7 C. B. N. S. 731; *Hardcastle* v. *S. Yorks. Ry. Co.* [1859] 4 H. & N. 67; *Gallagher* v. *Humphrey* [1862] 6 L. T. N. S. 684; *Ivay* v. *Hedges* [1882] 9 Q. B. D. 80; *Cooke* v. *Midland G. W. Ry. Co.* [1909] A. C. 229; *Barker* v. *Herbert* [1911] 2 K. B. 633; *Jenkins* v. *G. W. Ry. Co.* [1912] 1 K. B. 525; *Latham* v. *Johnson* [1913] 1 K. B. 398; *Brackley* v. *M. Ry.* [1916] 85 L. J. K. B. 1596; *Wilson* v. *Barry Ry.* [1917] 86 L. J. K. B. 433.

(*c*) [1856] 1 H. & N. 247; *Lees* v. *Dunkerley* [1911] A. C. 5; see also *Burchell* v. *Hickisson* [1881] 50 L. J. Q. B. 101.

(*d*) [1911] A. C. 10.

not a trespasser, and consequently was entitled to damages.

3. Anyone who has entered upon premises on lawful business in which the person having the control of such premises has an interest, and who has sustained injuries in consequence of such premises not being kept in a reasonably secure condition, is entitled to maintain an action for damages against such person.

In *Indermaur* v. *Dames* (*e*), plaintiff, in the employ of a gasfitter, went by appointment with defendant to see that certain gas apparatus fixed by his employer on defendant's premises acted properly. While there plaintiff fell down an unfenced shaft and was injured. Held, on above ground, defendant was liable.

The same principle is illustrated in the cases of *Smith* v. *London and St. Katherine Docks Co.* (*f*) and *Heaven* v. *Pender* (*g*). In the former case the defendants, a dock company, provided gangways from the shore to the ships lying in their

(*e*) [1866] L. R. 1 C. P. 274; *Pritchard* v. *Peto* [1917] 2 K. B. 173; *Maclenan* v. *Segar* [1917] 2 K. B. 325; *Norman* v. *G. W. Ry. Co.* [1914] 2 K. B. 153; *Dickson* v. *Scott* [1914] 30 T. L. R. 256; and see *Harris* v. *Perry* [1903] 2 K. B. 219; *Wright* v. *Lefever* [1903] 51 W. R. 149. For the application of this principle to children attending elementary schools, see *Ching* v. *Surrey C. C.* [1910] 1 K. B. 736 (C. A.); *Morris* v. *Carnarvon C. C.* [1910] 1 K. B. 840 (C. A.); *Shrimpton* v. *Hertfordshire C. C.* [1911] 104 L. T. 145 (H. L.); *Jackson* v. *London C. C.* [1912] 76 J. P. 217.

(*f*) [1868] 3 C. P. 326.

(*g*) [1883] 11 Q. B. D. 503.

dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the defendant's servants, for the purposes of the business of the dock, moved the gangway, so that it was, to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, was returning along it to the shore, when the gangway gave way and he was injured. Held, that there was a duty on the defendants towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.

In *Heaven* v. *Pender* (*h*), plaintiff, a workman, was employed by A. to paint A.'s ship, lying in a dock. Defendant, the dock owner, provided staging for workmen's use. The staging not being strong enough, broke, and plaintiff was injured. Held, defendant was liable, on the ground that **persons having the control of buildings or other structures intended for human use and occupation are bound to keep them in a reasonably safe condition,** and are liable for injuries caused by neglect of such duty to **any person upon the spot, or engaged in work on or about the property whose condition is in question,**

(*h*) [1883] 11 Q. B. D. 503.

in the course of any business in which the occupier has an interest (*i*).

In *O'Neill* v. *Everest* (*k*) the two last-mentioned cases were cited in the Court of Appeal on behalf of the plaintiff, but were distinguished on the ground that in both there was a concealed danger; in the one case the injury was caused by an insecure plank, in the other by a rotten rope. In the course of his judgment Lord Herschell, following the principle laid down in *Smith* v. *London and St. Katherine Docks Co.* (*l*), pointed out that, in order to succeed in an action of this kind, the plaintiff must prove a duty on the part of the defendant towards him to keep the premises in a reasonably secure condition, and, further, that the injury was the direct result of a breach by the defendant of such duty. It has been held in Ireland that there is no duty on the part of a landlord to a tenant holding over after

(*i*) This principle has been applied where the defendant was a contractor placed in control of buildings and a workman employed by sub-contractors was injured: *Elliott* v. *Roberts* [1916] 2 K. B. 518; and see *Kimber* v. *Gas Light & Coke Co.* [1918] 1 K. B. 439.

(*k*) [1892] 61 L. J. Q. B. 453; 66 L. T. 396. See also *Miller* v. *Hancock* [1893] 2 Q. B. 177 (C. A.); *Lane* v. *Cox* [1897] 1 Q. B. 415; *Huggett* v. *Myers* [1908] 2 K. B. 278; *Lewis* v. *Ronald* [1909] 101 L. T. 534; *Williams* v. *Parsons* [1909] 26 T. L. R. 78 (C. A.); *Powell* v. *Thorndike* [1910] 102 L. T. 600 (C. A.); *Lucy* v. *Bawden* [1914] 2 K. B. 318.

(*l*) [1868] 3 C. P. 326. See also *White* v. *France* [1877] 46 L. J. Q. B. 823; *Marney* v. *Scott* [1899] 1 Q. B. 986.

the expiration of a notice to quit. The tenant in such a case has only the rights of a trespasser (*m*).

Persons sometimes have rights over the lands of others, entitling them to do acts which, if they had not such rights, would be trespasses. Of such rights the chief are **easements** and **rights of common,** a detailed exposition of which would be out of place in this work; but the following important points may be noticed:—

Rights of proprietors of land with regard to water flowing through or under their lands:

1. Natural streams (*n*) **running above ground, and subterranean streams the courses of which are well known and clearly defined.**

Every riparian proprietor, *i.e.*, every person owning land adjoining a river, is deemed in law to own the soil up to the centre of the river, and if he interferes with it beyond that point he commits a trespass. Every proprietor of such adjoining land has, **as a natural right incident to the right to the soil itself,** a right to the **reasonable** use of the water; what is a reasonable quantity of water depending on the circumstances of each case (*o*). The above rule is, however, subject to

(*m*) *Coffee* v. *McEvoy* [1912] 2 Ir. R. 290.

(*n*) A stream which flows in a permanent defined channel is a watercourse although it is fed only by rain water and only flows during a portion of the year: *Stollmeyer* v. *Trinidad Lake Petroleum Co.* [1918] A. C. 485.

(*o*) *McCartney* v. *L. & L. S. Ry. Co.* [1904] A. C. 301; and see *Att.-Gen.* v. *G. N. Ry. Co.* [1908] 72 J. P. 442.

the provision that the adjoining proprietor must not thereby interfere with the use of other proprietors either above or below him—*e.g.*, he must not foul the stream (*p*), though he may do so by **grant** or **prescription** (*q*). Every riparian proprietor has the right to have the water come to him in its natural state in flow, quantity and quality, and to go from him without obstruction (*r*).

This right cannot be granted to a non-riparian owner (*s*).

The law as to **a subterranean stream, the course of which is well known and clearly defined,** as in the case of the river Mole, is the same as laid down above with regard to **natural streams flowing above ground** (*t*).

2. Artificial watercourses, as to which the law depends upon whether they are of a permanent or temporary character, and upon the circumstances under which they were created. If an artificial

(*p*) *Wood* v. *Waud* [1849] 3 Ex. 748; *Jones* v. *Llanrwst* U. D. C. [1911] 1 Ch. 393.

(*q*) *Embry* v. *Owen* [1851] 6 Ex. 353.

(*r*) See judgments in *Chasemore* v. *Richards* [1859] 7 H. L. C. 349; see also *Williams* v. *Morland* [1824] 2 B. & C. 910; *Young* v. *Bankier Distillery Co.* [1893] A. C. 691, at p. 698; and *Stollmeyer* v. *Trinidad Lake Petroleum Co.* [1918] A. C. 485. As to natural streams increased by artificial means, see *Portsmouth W. W. Co.* v. *L. B. & S. C. Ry. Co.* [1910] 74 J. P. 61.

(*s*) *Ormerod* v. *Todmorden* [1883] 11 Q. B. D. 155.

(*t*) Per Pollock, B., in *Dudden* v. *Guardians of Clutton Union* [1857] 1 H. & N. 630; cf. *Mostyn* v. *Atherton* [1899] 2 Ch. 360.

stream is **permanent** in its character, a right to the uninterrupted flow of the water may be acquired by **prescription** or **grant** against both the originator of the stream **and** also against any person over whose land the water flows (*u*); but long enjoyment of an artificial stream will not give a right to the unobstructed use of a stream **obviously made for temporary purposes,** as to drain a mine (*x*).

In *Greatrex* v. *Hayward* (*y*), the plaintiff's land enjoyed for fifty years the benefit of artificial drains made by defendant, a neighbouring farmer, to drain his own lands. It was held that plaintiff could not prevent defendant from deepening the drain for purposes of cultivation, and thereby depriving plaintiff of water enjoyed for fifty years, as the drain was originally made for temporary purposes.

"From the judgment in *Arkwright* v. *Gell* (*z*), it will be seen, that the reason why a right to the uninterrupted flow of the water of an artificial stream cannot be acquired **by prescription** against the originator of the stream, if it is of a **temporary** character, is, that the **temporary nature of the stream precludes a presumption of a grant**

(*u*) *Sutcliffe* v. *Booth* [1863] 32 L. J. Q. B. 136; *Holker* v. *Porrit* [1873] L. R. 10 Ex. 59; *Baily* v. *Clark* [1902] 1 Ch. 649.

(*x*) *Arkwright* v. *Gell* [1839] 5 M. & W. 203; *Wood* v. *Waud* [1849] 3 Ex. 748; *Burrows* v. *Lang* [1901] 2 Ch. 502.

(*y*) (1853) 8 Ex. 291.

(*z*) [1839] 5 M. & W. at p. 227.

of a permanent right; but the case is manifestly different if the stream is **permanent,** although artificial, for there can be no reason why a person who makes a **permanent** watercourse may not make a grant of right in perpetuity to use the water to any person through whose land the stream is made to flow; and, indeed, nothing is more likely than that an owner of land would stipulate, when such a watercourse is made, that he shall have the benefit and use of the water as it flows through his land. A presumption of such a grant, therefore, may be readily made, and it will receive the sanction of the law" (*a*).

3. Natural streams running underground in undefined or unknown channels, and percolating water, the course of which is underground, undefined, and unknown.

There is no natural right to the uninterrupted flow of such streams (*b*), **nor can such a right be acquired by prescription,** for such a right, "founded upon length of enjoyment, is supposed to have originated in some grant; but what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what

(*a*) Goddard on Easements, 7th ed. pp. 343, 344; and see *Whitmore* v. *Stanfords* [1909] 1 Ch. 427; and *Lewis* v. *Meredith* [1913] 1 Ch. 571.

(*b*) *Acton* v. *Blundell* [1843] 12 M. & W. 324.

extent, if at all, the enjoyment would be affected by any water percolating in and out of the defendant's or any other land? . . . The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant, but how could a man prevent or stop the percolation of water?" (*c*). In *Chasemore* v. *Richards* (*d*), A.'s mill was worked by a river, supplied by water produced by the rainfall over a large district. B. sank a well on his own land, and pumped up water for the supply of Croydon, thereby preventing an enormous quantity of water from ever reaching the river or the mill. Held, A. had no right of action against B. **Such a right may, however, be acquired by express grant** (*e*).

A landowner, therefore, may collect or dispose of such water, regardless of his neighbour's interests; but—

1. **He may not foul it**; for, though he may appropriate it, until appropriation there is no property in it; and whilst it percolates every owner through whose land it passes has a right to receive it in its natural condition.

(*c*) Per Wightman, J., in delivering the opinion of the judges to the House of Lords in *Chasemore* v. *Richards* [1859] 7 H. L. C. at p. 370.

(*d*) [1859] 7 H. L. C. 349.

(*e*) *Whitehead* v. *Parks* [1858] 2 H. & N. 870.

In *Ballard* v. *Tomlinson* (*f*), the plaintiff and defendant each possessed a well. The defendant turned sewage into his, whereby the plaintiff's became polluted. Held, by the Court of Appeal, unanimously reversing Pearson, J., in the Court below, that an action was maintainable.

2. **He will be restrained from drawing off the subterranean water on the adjoining land, if in so doing he draws off water which has once flowed in a defined surface channel.** "If you cannot get at the underground water without touching the water in a defined surface channel, you cannot get at it at all"; per Hatherley, L.C., in *The Grand Junction Canal Co.* v. *Shugar* (*g*): —thus distinguishing it from *Chasemore* v. *Richards* (*h*), where, likewise, the water in the river was diminished, but was diminished by preventing the subterranean water from ever reaching it, not (as in *The Grand Junction Canal Co.* v. *Shugar*) by drawing water away from the river itself.

(*f*) [1885] 29 Ch. D. 115. See also *Bradford Corporation* v. *Ferrand* [1902] 2 Ch. 655; cf. *Fergusson* v. *Malvern U. D. C.* [1909] 73 J. P. 361 (H. L.).

(*g*) [1871] L. R. 6 Ch. App. 488. See also *Jordeson* v. *Sutton* [1899] 2 Ch. 217 at p. 251.

(*h*) *Supra*, p. 76.

Every person commits a tort who so uses his own land as to damage his neighbour by depriving him of the subjacent or adjacent support necessary to retain such neighbour's land in its natural and encumbered state (*i*).

Notice carefully that this right to the support of the subjacent soil or of the adjacent land exists only **in favour of land unweighted by building,** *i.e.*, in favour of land in its natural state; and, further, that such an action will probably lie without proof of pecuniary loss, if actual subsidence is proved (*k*).

The owner may, however, part with this right, *e.g.*, by grant or by reservation in the conveyance to him (*l*).

A person may, however, drain off water, even though it lets down his neighbour's land (*m*), but this right does not extend to water saturated with minerals or semi-fluid minerals (*n*).

But the right to support of land weighted by buildings may be acquired—

(*i*) *Backhouse* v. *Bonomi* [1861] 9 H. L. C. 503; *Humphries* v. *Brogden* [1850] 12 Q. B. 739; *New Moss Colliery* v. *Manchester Corporation* [1908] A. C. 117; *Howley Park Coal Co.* v. *L. & N. W. Ry. Co.* [1913] A. C. 11.

(*k*) *Hamer* v. *Knowles* [1861] 6 H. & N. 454; *Attorney-General* v. *Conduit Colliery Co.* [1805] 1 Q. B. 301; and see *Butterley, &c., Co.* v. *New Hucknall, &c., Co.* [1910] A. C. 381; *Lampson* v. *Staveley* [1908] 25 T. L. R. 136.

(*l*) *Beard* v. *Moore* [1915] 1 Ch. 257; *Davies* v. *Powell Duffryn Co.* [1917] 1 Ch. 488.

(*m*) *Popplewell* v. *Hodkinson* [1869] L. R. 4 Ex. 248.

(*n*) *Trinidad Asphalt Co.* v. *Ambard* [1899] A. C. 594.

(1) By grant, which may be—

a. **Express;** or

b. **Implied,** *e.g.*, as in *Rigby* v. *Bennett* (*o*), where a man granted part of his land for building.

(2) By prescription (*p*).

The rule laid down in the famous case of *Angus* v. *Dalton* (*q*), is, that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, before the beginning of that time; and that it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building.

In *Lemaitre* v. *Davies* (*r*), Hall, V.-C., held that the owner of buildings can acquire by prescription, as an easement within the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2, a right to support from the buildings of the adjoining owner. But where buildings are not adjoining,

(*o*) [1882] 21 Ch. D. 559.

(*p*) Prescription is only applicable to such rights as are capable of arising by virtue of a grant: *Chesterfield* v. *Harris* [1908] 2 Ch. 397.

(*q*) [1881] 6 App. Cas. 740. The rule also applies to docks and similar constructions: *Union Lighterage Co.* v. *London Graving Dock* [1902] 2 Ch. D. 557.

(*r*) [1882] 19 Ch. D. 281.

no right of support can be so acquired. In *Solomon* v. *Vintners' Co.* (*s*), three contiguous houses in a street leaned out of the perpendicular for thirty years, A.'s leaning on B.'s, B.'s on C.'s. C. removed his and the rest fell. In an action by A., it was held that he had no right to have his house supported by C.'s through the intervening house.

The **right to support** referred to in these different cases is **quite independent of any question of negligence.** A man is, of course, always responsible to his neighbour for carrying out works on his own land in a negligent and improper way (*t*).

"**Waste** is any unauthorized act of a tenant of a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement or otherwise to the injury of the inheritance" (*u*). Such injury may be loss of market value, or an alteration throwing doubt on the identification of the property, and thereby impairing the evidence of the title (*x*).

Voluntary waste is where the waste consists in the active doing of something, *e.g.*, pulling down

(*s*) [1860] 4 H. & N. 585.

(*t*) See *Bower* v. *Peate* [1876] 1 Q. B. D. 321; and *Hughes* v. *Percival* [1883] 8 App. Cas. 443, *supra*, p. 45.

(*u*) Pollock, 11th ed. p. 356.

(*x*) Per Jessel, M.R., in *Jones* v. *Chappell* [1875] L. R. 20 Eq. 539; *Meux* v. *Cobley* [1892] 2 Ch. 253.

a house, which alters the nature of the thing demised to the prejudice of the reversion (*y*).

Permissive waste is a mere passive act, *e.g.*, allowing a house to go to wrack and ruin, by reason of non-repair (*z*).

Legal waste is a term used to describe waste for which there lay a remedy *at law*,—**equitable waste,** waste which was only recognized as such and relieved against *in equity*. If an estate were given to a limited owner without impeachment for waste, at law he could commit what waste he chose, but equity would interfere to prevent his pulling down the mansion-house, or cutting ornamental timber; and these acts were called **equitable waste.** As regards the remedy in this case, the **Judicature Act, 1873** (36 & 37 Vict. c. 66), has abolished the distinction. By sect. 25 (3) of that Act, "an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

The general rule is that tenants for life, for years, at will, and at sufferance, are liable for waste. This is, however, subject to the qualifica-

(*y*) *Jones* v. *Chappell, supra; West Ham C. C. Board* v. *E. London W. W. Co.* [1900] 1 Ch. 624.

(*z*) *Auworth* v. *Johnson* [1832] 5 C. & P. 239.

tion that, in the absence of an express covenant or an obligation not to commit waste imposed by the instrument creating the estate (*a*), neither a tenant for life (*b*), nor a tenant at will (*c*), is liable for permissive waste (*d*).

A tenant in fee simple, of course, is not liable for waste; nor is a tenant in tail, because he can at any time bar the entail, and make himself tenant in fee simple; but a tenant in tail, after possibility of issue extinct, is liable for equitable waste, inasmuch as he cannot bar the entail.

Nuisance is "the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases in the exercise of a common right" (*e*): it is either—

1. **Public,** *i.e.*, an act affecting the public at large, or some considerable portion of them. Remedy—indictment or informa-

(*a*) *Woodhouse* v. *Walker* [1880] 5 Q. B. D. 504.

(*b*) *Powys* v. *Blagrave* [1854] 4 De G. M. & G. 448; *Barnes* v. *Dowling* [1881] 44 L. T. N. S. 809; *In re Cartwright, Avis* v. *Newman* [1889] 41 Ch. D. 532; *In re Parry* [1900] 1 Ch. 160.

(*c*) *Gibson* v. *Wells* [1805] 1 B. & P. N. R. 290; *Harnett* v. *Maitland* [1847] 16 M. & W. 257; *Blackmore* v. *White* [1899] 1 Q. B. 293.

(*d*) In *Davies* v. *Davies* [1888] 38 Ch. D. 499, Kekewich, J. held that a tenant for years *is* liable for permissive waste, but it may be respectfully doubted whether this decision would be upheld in a higher Court. See *Barnes* v. *Dowling, supra*; and the observations of Kay, J. in *In re Cartwright, Avis* v. *Newman* [1889] 41 Ch. D. at p. 535.

(*e*) Pollock, 11th ed., p. 405.

tion, or action for an injunction at the suit of the Attorney-General (*f*).

2. **Private,** *i.e.*, an act affecting some particular individual or individuals, as distinguished from the public at large. Remedy—action for damages or an injunction, or both; also **abatement,** *i.e.*, removal of the nuisance by the party injured, which removal must be (1) peaceable; (2) without danger to life or limb; and (3) (if it is necessary to enter another's land to abate the nuisance, or where the nuisance is a dwelling-house in actual occupation or on a common (*g*)) after notice, unless it is unsafe to wait. These three remedies are confined to private nuisances, but in one case they are applicable to public nuisances, namely, where the act complained of more prejudicially and injuriously affects some particular individual or individuals than the public at large. In *Soltau* v. *De Held* (*h*), plaintiff resided in a house next to a

(*f*) See, for example, *Attorney-General* v. *W. H. Smith & Son* [1910] 26 T. L. R. 482.

(*g*) *Perry* v. *Fitzhowe* [1845] 8 Q. B. 757. See also *Lemmon* v. *Webb* [1895] A. C. 1; *Mills* v. *Brooker* [1919] 1 K. B. 555. For an instance where abatement is not permissible, see *Hope* v. *Osborn* [1913] 2 Ch. 349.

(*h*) [1851] 2 Sim. N. S. 311; and see *Heath* v. *Brighton Corporation* [1908] 98 L. T. 718. Collecting crowds to the

Roman Catholic chapel, of which defendant was priest. The chapel bell was rung at all hours, day and night. Though the ringing was a public nuisance, it was held, on the above ground, that plaintiff was entitled to an injunction.

Nuisances are also—

1. **Those causing damage to property,** for which substantial compensation can always be obtained. In *St. Helens Smelting Co.* v. *Tipping* (*i*) the fumes from the company's works killed the plaintiff's shrubs. Held, sufficient cause of action for nuisance against company.
2. **Those causing personal discomfort.** It is necessary to show material and continuous interference with "the physical comfort of human existence," according to an ordinary reasonable standard; thus it has been held that temporary annoyance caused by the execution of lawful works does not amount to a nuisance (*k*).

annoyance of neighbours is a nuisance: *Barber* v. *Penley* [1893] 2 Ch. 447; *Lyons* v. *Gulliver* [1914] 1 Ch. 631.

(*i*) [1865] 11 H. L. C. 650. See also *Wood* v. *Conway Corporation* [1914] 2 Ch. 47; *Smith* v. *Giddy* [1904] 2 K. B. 448; *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14; *Price* v. *London C. C.* [1908] 2 Ch. 526; and *Owen* v. *Faversham Corporation* [1909] 73 J. P. 33 (C. A.).

(*k*) *Harrison* v. *Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409; *Polsue* v. *Rushmer* [1907] A. C. 121; *May* v. *Stoop*

It is no defence to an indictment for nuisance to show that the act complained of is in some other way beneficial to the public. Thus, before tramways were authorized by statute, it was decided in *Reg.* v. *Train* (*l*) that to lay down a tramway in a public street, thereby obstructing the ordinary traffic, was an indictable nuisance at common law, though the number of persons using the tramcars, and so saving time and money, was much greater than the number of those who were obstructed.

It is no defence that plaintiff himself came to the nuisance (*m*), or that the trade or business causing annoyance is otherwise harmless, or even in itself necessary and praiseworthy. Thus, as was said in *Jones* v. *Powell* (*n*), "a tan house is necessary, for all men wear shoes; nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass house; and they ought to be erected in places convenient for them." Although it is *primâ facie* a defence that the plaintiff gave permission

[1909] 25 T. L. R. 262 (crying children); *Robinson* v. *L. G. O. Co.* [1910] 26 T. L. R. 233 (motor bus); but see *Wing* v. *L. G. O. Co.* [1909] 2 K. B. 652. As to rebuilding, see *Clark* v. *Lloyd's Bank* [1910] 79 L. J. Ch. 645; *De Keyser* v. *Spicer* [1914] 30 T. L. R. 257.

(*l*) [1862] 2 B. & S. 640; cf. *Walton* v. *Vanguard Motor Bus Co.* [1909] 72 J. P. 505; *Gunter* v. *James* [1909] 72 J. P. 448.

(*m*) *St. Helens Smelting Co.* v. *Tipping*, *supra*, p. 84; *Salvin* v. *N. Brancepeth Co.* [1873] L. R. 9 Ch. 705.

(*n*) [1628] Palm. at p. 539.

to the defendant to carry on the trade or business (*o*), this does not mean that such a permission entitles the defendant to carry on the trade or business in such a manner as to be a nuisance (*p*).

Where a nuisance is caused by the **non-repair of premises**, the **occupier** of such premises is *primâ facie* liable (*q*); but the **landlord** is liable (1) if he has authorized the continuance of the nuisance (and it seems that merely letting the premises in a ruinous condition does *not* constitute such an authorization) (*r*), or (2) if by the terms of the lease he is bound to repair (*s*), but not otherwise (*t*). Where the occupier of land grants a licence to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant in an action to restrain the nuisance (*u*).

It must be borne in mind that an ordinary and natural use of land will not give a cause of action

(*o*) *Hall* v. *Lund* [1863] 1 H. & C. 678; *Lyttleton Times Co.* v. *Warners* [1907] A. C. 476.

(*p*) *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634.

(*q*) *Tarry* v. *Ashton* [1876] 1 Q. B. D. 314; *Ayers* v. *Hanson* [1912] 56 S. J. 735; but see *Palmer* v. *Bateman* [1908] 2 Ir. R. 393; and *Pritchard* v. *Peto* [1917] 2 K. B. 173.

(*r*) *Pretty* v. *Bickmore* [1873] L. R. 8 C. P. 401; *Gwinnell* v. *Eamer* [1875] L. R. 10 C. P. 658.

(*s*) *Todd* v. *Flight* [1860] 9 C. B. N. S. 377; *Broggi* v. *Robins* [1898] 14 Times L. R. 439.

(*t*) See *Pretty* v. *Bickmore*, and *Gwinnell* v. *Eamer*, *supra*; also *Nelson* v. *Liverpool Brewery Co.* [1877] 2 C. P. D. 311.

(*u*) *White* v. *Jameson* [1874] L. R. 18 Eq. 303; *Attorney-General* v. *Tod Heatley* [1897] 1 Ch. 560.

even if damage is caused to neighbours, *e.g.*, there is no duty in law to cut thistles, though the thistledown will be carried on to other persons' soil (*x*). It is otherwise if a landowner so uses his land as to increase the damage, *e.g.*, making a rabbit warren (*y*), or rearing and turning out game birds (*z*), or collecting manure heaps (*a*).

Beware of the misleading phrase, "rights to light and air." **Right to light** is one thing; **right to air** is another. There is no such right known to the law as the specific right to the access of air over a neighbour's land. In *Webb* v. *Bird* (*b*) it was held that the owner of a windmill cannot, under sect. 2 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, though the mill has been worked by this air for over twenty years. In *Bryant* v. *Lefevre* (*c*), it was held that the access of air to chimneys cannot, as against the occupier of neighbouring land, be claimed (1) as a natural right of property, or (2)

(*x*) *Giles* v. *Walker* [1890] 24 Q. B. D. 656; cf. *Stein* v. *Prentice* [1919] 1 K. B. 394.

(*y*) *Boulston's Case* [1597] 5 Rep. 104 b.

(*z*) *Farrer* v. *Nelson* [1885] 15 Q. B. D. 258.

(*a*) *Bland* v. *Yates* [1914] 58 S. J. 612.

(*b*) [1862] 13 C. B. N. S. 841 (Ex. Ch.); *Chastey* v. *Ackland* [1895] 2 Ch. 389; [1897] A. C. 165.

(*c*) [1879] 4 C. P. D. 172. See also *Harris* v. *De Pinna* [1886] 33 Ch. 238; *Bass* v. *Gregory* [1890] 25 Q. B. D. 481; *Cable* v. *Bryant* [1908] 1 Ch. 259; *Jones* v. *Pritchard* [1908] 1 Ch. 630.

as an easement, by prescription from the time of legal memory, or (3) by a lost grant, or (4) under the Prescription Act, 1832.

An action, however, lies where the stoppage of air is injurious to health (*d*).

There is no easement of prospect or privacy known to the law, but a purchaser or tenant frequently obtains such a right by covenant or by the doctrine that no one may derogate from his own grant (*e*).

Right to light is not a natural right incident to the ownership of windows, but **an easement**, to which title must be shown—

1. **By grant,** express or implied, *e.g.*, where, as in *Palmer* v. *Fletcher* (*f*), a man grants a house in which there are windows, neither he nor anyone claiming under him can stop up the windows or destroy the lights; or
2. **By prescription at common law;** or
3. **By prescription under the Prescription Act, 1832** (2 & 3 Will. 4, c. 71), s. 3, by which twenty years' use, unless by written consent (*g*), gives the right (*h*).

(*d*) *City of London Brewery Co.* v. *Tennant* [1873] L. R. 9 Ch. 221; and see *Aldin* v. *Latimer* [1894] 2 Ch. 437.

(*e*) See *Browne* v. *Flower* [1911] 1 Ch. 219.

(*f*) [1664] 1 Sid. 167, 207; cf. *Schwann* v. *Cotton* [1916] 2 Ch. 459.

(*g*) A verbal consent is not enough: *Mallam* v. *Rose* [1915] 2 Ch. 222.

(*h*) The section applies to adjoining tenements held by differ-

By sect. 4, nothing is to be deemed an interruption unless submitted to for a year after notice. Therefore, in *Flight* v. *Thomas* (*i*), where there had been an enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before action, it was held that such an enjoyment was sufficient to establish the right. In certain cases, where the owner's rights as to his land were interfered with by Government action during the war, the Court has power to suspend the running of the period (*j*).

An owner of ancient lights can restrain any **substantial** interference with the light enjoyed previously to the interruption sought to be restrained, and his rights are not limited merely to sufficient light for his present business. In *Yates* v. *Jack* (*k*), a merchant's warehouse had its lights blocked by a building opposite, and the defendant's plea, that enough light was still left for his **business** purposes, was held bad.

ent tenants from the same landlord : *Fear* v. *Morgan* [1907] A. C. 425; *Hyman* v. *van den Bergh* [1908] 1 Ch. 167. It only applies to windows and similar apertures, not to doorways. *Levet* v. *Gas Light & Coke Co.* [1919] 1 Ch. 24.

(*i*) [1840] 11 A. & E. 688.

(*j*) Courts (Emergency Powers) (No. 2) Act, 1916, s. 3.

(*k*) [1866] L. R. 1 Ch. 295.

On the other hand, in order to succeed in an action for the obstruction of ancient lights, it is not sufficient for the plaintiff to prove merely that the light is less than before. After much uncertainty it is now settled that he must prove that the diminution of light is such as really makes the dominant tenement **to a sensible degree** less fit for the ordinary purposes of business or occupation (*l*)—that is, he must prove a nuisance.

A right to a special amount of light necessary for a particular business cannot be acquired by prescription (*m*).

Where the owner of the dominant tenement so alters his buildings as to increase the burden on the servient tenement, it is impossible to sever the burden and say he is still entitled to impose on the servient tenement the burden which had previously existed; in other words, by so altering his buildings he loses his right of light (*n*).

If a person opens new lights, these may be obstructed with impunity; but an existing right to light is not lost by interruption which is not continuous in time and quantity (*o*), or by a sub-

(*l*) *Back* v. *Stacey* [1826] 2 C. & P. 465; *Colls* v. *Home and Colonial Stores* [1904] A. C. 179; *Jolly* v. *Kine* [1907] A. C. 1; *Higgins* v. *Betts* [1905] 2 Ch. 210; *Davis* v. *Marrable* [1913] 2 Ch. 421.

(*m*) *Ambler* v. *Gordon* [1905] 1 K. B. 417.

(*n*) *Ankerson* v. *Connelly* [1906] 2 Ch. 844 (C. A.); and see *Bailey* v. *Holborn and Frascati* [1914] 1 Ch. 598.

(*o*) *Presland* v. *Bingham* [1889] 41 Ch. D. 268.

sequent intermission of enjoyment not amounting to intentional abandonment, or by enlarging, rebuilding, or altering the window for which access of light is claimed (*p*), so long as the ancient lights, or a material part thereof, remain substantially capable of continuous enjoyment. It is not necessary that the structural identity of the old windows be preserved (*e.g.*, a house may be pulled down and rebuilt (*q*)), but the plaintiff must give evidence as to the position of the ancient lights (*r*).

B. Of Wrongs to Personal Property.

Trespass to goods is the wrongful meddling by a person with the goods of another, either by removing them, or by otherwise dealing with them.

Conversion is the removal of goods from the possession of another with the design of depriving that other of them, or of exercising some dominion or control over them for his own benefit, or the benefit of some third person.

It is important to notice the fundamental distinction between these two wrongs. Trespass is essentially a wrong to the actual possessor, and therefore cannot be committed by a person in

(*p*) *Tapling* v. *Jones* [1865] 11 H. L. C. 290; *Ecclesiastical Commissioners* v. *Kino* [1880] 14 Ch. D. 213; *Greenwood* v. *Hornsey* [1886] 33 Ch. D. 471.

(*q*) *Scott* v. *Pape* [1886] 31 Ch. D. 554.

(*r*) *Fowlers* v. *Walker* [1882] 51 L. J. Ch. 443.

possession (*s*); conversion, on the other hand, is a wrong to the person entitled to immediate possession. The actual possessor is frequently, but not always, the person entitled to immediate possession, so that conversion may, but does not necessarily, include trespass.

An action for trespass lies against A. by B. when A. takes goods from the possession of B. This is so, even though B. is not the true owner; **provided** B.'s possession is (1) either actual or constructive (*t*), and (2) rightful as regards A. In other words, bare possession is generally a sufficient title as against a wrongdoer (*u*). In *Armory* v. *Delamirie* (*x*), a chimney-sweep found a jewel. He inquired its value of a jeweller, who under a pretence of weighing it, took out the stone and then offered him three halfpence for it, and on the offer being declined refused to give it up. Held (1) the finder has a property against all but the true owner; (2) on non-production, the jewels must be considered to be of the finest water, for *omnia præsumuntur contra spoliatorem*.

(*s*) *Johnson* v. *Diprose* [1893] 1 Q. B. 512.

(*t*) See p. 58, *supra*.

(*u*) *The Winkfield* [1902] P. 42, 54, 55 (C. A.); *Glenwood Lumber Co.* v. *Phillips* [1904] A. C. 405.

(*x*) [1722] 1 Sm. L. C. 12th ed. p. 396. See also *Bridges* v. *Hawkesworth* [1851] 21 L. J. Q. B. 75; and *South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q. B. 44, and the discussion of these cases in Clerk and Lindsell on Torts, 6th ed. pp. 11, 267, 287.

In conversion, the wrong is committed by "dealing with goods in a manner inconsistent with the right of the true owner. . . . provided . . . there is also an intention . . . in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. That intention is conclusively proved if the defendant has taken the goods as his own or used the goods as his own" (*y*). It is conversion none the less, though the wrongdoer only deals with the goods **as owner** for a very short time, and for a very limited purpose. It is no excuse that the defendant was acting under a mistaken, although an honest, and even reasonable, supposition of being lawfully entitled (*z*). Refusal to deliver on demand is evidence, but evidence only, of conversion, as there are cases (*e.g.*, the case of a servant in possession) where delay is justifiable.

Is a person liable for conversion if he *bonâ fide* deals with goods at the request of the apparent owner? He is not liable if he deals with (*contrà*, if he assumes to dispose of) goods as the servant or agent of an apparent owner in actual possession (or under a contract with such apparent owner) according to the apparent owner's direction; provided (1) the act done (or the contract) does not purport to involve a trans-

(*y*) Per Atkin, J., in *Lancs. & Yorks. Ry.* v. *MacNicholl* [1919] 88 L. J. K. B. 601, at p. 605.

(*z*) Per A. T. Lawrence, J., in last-cited case at p. 603.

fer of the supposed property in the goods, and (2) the ostensible owner's direction is one which he could lawfully give if he were the true owner, and (3) which is obeyed in the honest belief that he is (*a*). See *Hollins* v. *Fowler* (*b*) (especially Lord Blackburn's observations (*c*)), where the defendants were held liable in conversion, because they exercised **a real and effective,** though transitory, dominion—they **assumed to dispose of** the goods. Applying the above rule, if A. steals corn, and takes it to a miller to be ground and returned to him, the miller is not liable in conversion; but if A. tells his servant B. to sell the stolen corn to C., and B. does so, B. is liable in conversion, even though he believes that the corn belongs to his master, A. This principle has been applied so as to render an auctioneer liable for selling goods in the ordinary course of his business, although he had no notice of the apparent owner's want of title (*d*).

If a bailee who has an interest, but a special and limited one, in the goods the subject of the bailment (*e.g.*, in case of hire or pledge), under cover of such interest deals with the goods in excess of his rights, he is only liable in conver-

(*a*) Pollock, 11th ed. pp. 364—367.

(*b*) [1875] L. R. 7 H. L. 757; cf. *New York Breweries* v. *Attorney-General* [1899] A. C. 62, at p. 70.

(*c*) [1875] L. R. 7 H. L., at pp. 768—781.

(*d*) *Consolidated Co.* v. *Curtis* [1892] 1 Q. B. 495. As to a pawnbroker, see *Singer* v. *Clark* [1879] 5 Ex. D. 37.

sion if his acts are wholly inconsistent with the contract under which he had the limited interest, as, *e.g.*, if a hirer sells or destroys the goods hired (*e*).

The general rule is, that **no one can acquire a title to a chattel personal from a person who has himself no title to it**; but this has no application to—

1. **A person who bona fide, and for valuable consideration, receives a negotiable instrument—**

   e.g., a bill of exchange or a promissory note—such person being entitled to recover upon it, even though it has been stolen or fraudulently obtained by the person from whom he received it.

   In *Miller* v. *Race* (*f*), plaintiff was a *bonâ fide* holder for valuable consideration of a note stolen from a mail-bag by highway robbers. On presentation, the bank clerk refused to cash, or even to return it. Held, plaintiff was entitled to recover on the note.

   If the instrument is not negotiable, *e.g.*, payable to order, and not indorsed, the thief or finder cannot pass any title to it

(*e*) *Cooper* v. *Willomatt* [1845] 1 C. B. 672.

(*f*) [1758] 1 Burr. 452; but see *Smith* v. *Prosser* [1907] 2 K. B. 735. As to the position of a bank under section 82 of the Bills of Exchange Act, 1882, see *Ross* v. *London County &c. Bank* [1919] 1 K. B. 678.

by forging the indorsement, except, indeed, as against himself (*g*); nor in the case of a cheque crossed "not negotiable" can a person pass any better title than he has himself (*h*).

The rule as to negotiable instruments includes current coin of the realm, but does not apply to a coin which has only been kept as a curiosity (*i*).

2. Sale in market overt, provided that the purchaser buys the goods in good faith and without notice of any defect or want of title on the part of the seller—by the Sale of Goods Act, 1893 (*k*), s. 22.

If, however, the goods have been stolen and the thief is prosecuted to conviction, the property in the goods revests in the original owner:—

(1) On conviction, if in the opinion of the Court before whom the conviction takes place the title to the goods is not in dispute and such Court direct restitution and that the property shall revest at once.

(2) On the expiration of ten days after the conviction if the Court has not

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24.
(*h*) *Ibid.* sect. 81.
(*i*) *Moss* v. *Hancock* [1899] 2 Q. B. 111.
(*k*) 56 & 57 Vict. c. 71.

given the direction mentioned in (1) above and if there is no appeal.

(3) On dismissal of an appeal against the conviction, unless the Court of Criminal Appeal annuls or varies an order for restitution made by the Court before whom the conviction took place, in which case the order, if annulled, does not take effect, or, if varied, takes effect as varied (*l*).

Sale in market overt is sale in open market, as opposed to sale in private, and means—(1) **in the City of London,** sale in an open shop of goods usually sold in such shop (*m*); **(2) in the country and elsewhere,** sale in the market-place, or on the piece of ground customarily used for the sale of goods.

Where the seller of goods has obtained them in such a way that he has **no title at all,** the *bonâ fide* purchaser can acquire no title to them except by buying them in market overt, and even in that case, if the goods have been stolen, and the

(*l*) Sale of Goods Act, 1893, s. 24; Criminal Appeal Act, 1907, s. 6. The latter Act makes no other alteration. Consequently, no appeal lies to the Court of Criminal Appeal from such an order alone : *Rex* v. *Elliott* [1908] 2 K. B. 452. It would seem that, if the bailee of the article allows the Court to make a restitution order without informing the Court that he holds it on behalf of a bailor, else he will be liable if the article is thereby lost : *Ranson* v. *Platt* [1911] 1 K. B. 499.

(*m*) *Hargreave* v. *Spink & Son* [1892] 1 Q. B. 25; and see *Clayton* v. *Le Roy* [1911] 2 K. B. 1031.

thief is prosecuted to conviction, the *bonâ fide* purchaser will lose his title against the original owner on the occurrence of the events mentioned in (1), (2) or (3) on the two preceding pages (*n*). If, however, the seller at the time of selling the goods, had **a title which was voidable,** but which had not then been avoided, *e.g.*, if he had obtained them by means of a contract induced by fraud, the *bonâ fide* purchaser acquires a good title to the goods of which he cannot in any way be divested (*o*).

Where **horses** are stolen, and are then sold in market overt to a *bonâ fide* purchaser for value, even then the property does not pass, unless certain formalities required by statutes of Mary and Elizabeth (*p*) are complied with, viz.: —

(1) The horse must be exposed in open market for one hour between 10 a.m. and sunset;

(2) A minute description of buyer, seller, horse and terms of contract, must be entered in the book-keeper's book;

and even then, if the horse has been *stolen*, the rightful owner can recover it within six months

(*n*) Sale of Goods Act, 1893, ss. 22, 23, 24, and Criminal Appeal Act, 1907, s. 6.

(*o*) Sale of Goods Act, 1893, s. 23. Compare *Cundy* v. *Lindsay* [1878] 3 App. Cas. 459, with *King's Norton Metal Co.* v. *Edridge* [1897] 14 T. L. R. 98. See also *Gordon* v. *Street* [1899] 2 Q. B. 641; *Whitehorn* v. *Davison* [1911] 1 K. B. 463; *Phillips* v. *Brooks, Ltd.* [1919] 2 K. B. 243.

(*p*) 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12.

of the sale by tendering to the person possessed of it the price paid by such person.

No writ of execution against goods affects the title to such goods acquired by any person *bonâ fide* and for valuable consideration before actual seizure under such writ; provided that the purchaser had not, at the time when he acquired the title, notice that such writ had been issued (*q*).

Recaption is the retaking by a lawful owner of goods of which he has been wrongfully deprived. He may retake them wherever he may find them, provided he does not do so riotously, or by committing a breach of the peace.

In Trespass or Conversion who is entitled to sue? Generally the person possessed of the goods at the time of the wrongdoing; but in bailment, the bailor may sue for an injury of **a permanent** nature (*e.g.*, if goods are destroyed or permanently damaged), and the bailee may sue for the direct loss to him.

Remedies:—

1. **Formerly, for direct trespass** there lay the action of **trespass** for **damages** for the direct injury done; and **for injury indirectly resulting from the trespass** there lay the so-called action of **trespass on the case.**

(*q*) Sale of Goods Act, 1893, s. 26.

Now, the proper remedy for trespass to goods is an action for damages.

2. **Formerly, for conversion** there lay the action of **trover** (based on the assumption, generally a fiction, that defendant had found the goods in question) **for the value (not for the return) of the goods.**

Now, for conversion an action lies for the value of the goods.

3. **Formerly, for wrongful detention of goods** there lay the action of **detinue,** which was an action **for damages for wrongful detention** *or* **for the return of the goods.** Defendant, on an adverse verdict, could return the goods or pay their value; but by the **Common Law Procedure Act, 1854,** plaintiff might apply to the Court to order the return of the goods, without giving defendant the option of retaining them on payment of their value.

Although the distinction between forms of action was abolished by the Judicature Acts, yet the following causes of action still exist:—

Trespass to recover damages for **interference** with **goods,**

Trover to recover **the value of goods** for **wrongful conversion** thereof,

Detinue to obtain **the return of goods wrongfully detained,** with or without **damages** for their **detention.** Detinue does not lie

unless there has been a demand and refusal (*r*).

In none of these actions is it necessary to prove that the defendant did not act in good faith (*s*).

Action of replevin. The owner of goods unlawfully distrained, seized under colour of distress or otherwise, can obtain the replevying—*i.e.*, the return of such goods—on giving security to the registrar of the district County Court to prosecute an action of replevin against the seizor without delay, and to return the goods if a return should be adjudged. The action must be commenced within one month in the district County Court (*t*), or within one week in the High Court. In the latter case, unless judgment be obtained by default, the plaintiff must prove that he had good ground for believing either that the title to some hereditament, the yearly rent or value whereof exceeded £20, or to some toll, market, fair, or franchise was in question, or that the rent or damage subject of the distress, or the value of the goods seized, exceeded £20 (*u*).

A patent (*x*) is a privilege given by the Crown

(*r*) *Clayton* v. *Le Roy* [1911] 2 K. B. 1031.

(*s*) *Pridgeon* v. *Mellor* [1912] 28 T. L. R. 241.

(*t*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 136.

(*u*) *Ibid.* s. 135.

(*x*) The main statute is the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), as amended slightly by 8 Edw. 7, c. 4; and extensively by the Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80). It must be remembered that war conditions led to the passing of various Emergency Acts which affected patents

to the true and first inventor within the realm of any new manufacture of general utility **for sixteen years** (*y*) **or less, to make and vend** it exclusively, on condition of filing a specification —*i.e.*, a complete description of the invention, so that any ordinary skilful person can use it at the end of the term.

It is sufficient that the invention be new within the realm, so that no objection can be made that it was already known abroad or in the Colonies (*z*).

The invention of a new process or product (*a*), or of an improvement (*b*) on an existing invention, may be patented, but not where it is the discovery of a principle or natural law (*c*). A certain amount of ingenuity and utility is also essential.

The specification may be provisional or complete. A provisional specification is, however, required to be followed by a complete specification within six months of the application. It

and that some of the provisions of the Peace Treaties expressly deal with alien enemy interests. These Treaties are law by virtue of the Treaty of Peace Acts, 1919 and 1920.

(*y*) Patents and Designs Act, 1919, s. 6.

(*z*) *Rolls* v. *Isaacs* [1881] 19 Ch. D. 268.

(*a*) As to chemical products, food and medicine, see Patents and Designs Act, 1919, s. 11.

(*b*) *Hopkins* v. *Linotype and Machinery* [1910] 101 L. T. 898 (H. L.).

(*c*) *Patterson* v. *Gas Light & Coke Co.* [1876] 2 Ch. D. 812; cf. *Dover* v. *Bernstein* [1910] 54 S. J. 250.

can be amended by leave of the Court (*d*). If the specification is fraudulent, it will be void (*e*).

When an application has been received it is examined, and on the examiner's report the Comptroller-General may accept or refuse to accept it, or require amendment. An appeal lies from him to the Attorney-General. If the application has been accepted it is advertised, and then any one may oppose the grant within two months afterwards (*f*). If there is no opposition, or it is overruled, the patent is sealed and dates from the day of the application. The applicant can make use of his invention between the acceptance and sealing without prejudicing his application for a patent.

The patentee may either use his rights himself or assign them or grant licences (*g*). If a licensee exceeds the terms of his licence he will be liable for an infringement (*h*). A licensee cannot sue for infringement (*i*). In certain cases,

(*d*) *In re Geipel* [1903] 2 Ch. 715; *In re Klaber* [1908] 1 Ch. 847; *Gillette* v. *Lund* [1910] 2 Ch. 373.

(*e*) *Re Ralston's Patent* [1909] 100 L. T. 386.

(*f*) Patents and Designs Act, 1907, s. 11, as amended by the Patents and Designs Act, 1919, s. 4.

(*g*) He may cause his patent to be endorsed "Licences of right" and then anyone may obtain a licence on terms which in case of disagreement will be settled by the Comptroller: Patents and Designs Act, 1919, s. 2.

(*h*) *Roger* v. *Cochrane* [1909] A. C. 285; but see *Gillette* v. *Gamage* [1909] 25 T. L. R. 808; *National Phonograph Co.* v. *Monck* [1911] 27 T. L. R. 239.

(*i*) See *Neilson* v. *Horniman* [1910] 26 T. L. R. 188.

the Court will compel a patentee to grant licences.

Where the Court deems the patentee inadequately remunerated by his patent, it may, upon petition and his compliance with certain conditions, extend his patent for another seven, or in exceptional cases fourteen, years (*k*).

A patent may be revoked after grant either on petition or by way of counterclaim to an action for infringement. One ground is that the article is wholly or mainly manufactured abroad (*l*). But the patentee may show that under the circumstances there was good reason for not manufacturing here (*m*). The petition is addressed to the Comptroller-General, but an appeal lies from his decision to the Court (*n*).

If any person infringes the patent he will be liable to an action for damages and an injunction (*o*). Although the Crown is bound by the patent laws, yet provision is made for the use

(*k*) *In re Johnson* [1908] 2 Ch. 487; *In re Johnson* (No. 2) [1909] 1 Ch. 114; *In re Thompson* [1909] 2 Ch. 447.

(*l*) Patents and Designs Act, 1919, s. 1 and see s. 3; *In re Hatschek* [1909] 1 Ch. 76; *In re Bremer* [1909] 2 Ch. 217.

(*m*) *In re Taylor* [1912] 1 Ch. 635; *In re Fiat Motors* [1911] 1 Ch. 66.

(*n*) Patents and Designs Act, 1907, s. 18, as amended by the Patents and Designs Act, 1919, s. 7.

(*o*) Patents and Designs Act, 1907, s. 34, as amended by the Patents and Designs Act, 1919, s. 10. The mere purchase of machinery, which contravenes a patent, with the intention of using it, constitutes an infringement, whether it is in fact used or not: *British United Shoe Co.* v. *Collier* [1910] 26 T. L. R. 587, H. L.; and see Patents and Designs Act, 1907, s. 93.

of inventions by Government departments on exceptional terms.

If a person wrongly claims a patent and threatens legal proceedings against anyone for infringement, the latter can obtain an injunction to restrain him from so doing (*p*), but apparently not to restrain him from claiming to be an exclusive licensee of a patent (*q*).

Copyright exists under the Copyright Act, 1911 (*r*), which has repealed both existing statutes (*s*) and the common law (*t*).

Copyright is the sole right to produce or reproduce an original literary (*u*), dramatic (*x*),

(*p*) Patents and Designs Act, 1907, s. 36; and see *Craig* v. *Dowding* [1908] 98 L. T. 231.

(*q*) *Diamond Coal Cutting Co.* v. *Mining Appliances Co.* [1916] 85 L. J. Ch. 232.

(*r*) The Emergency Acts and the provisions in the Peace Treaties should be borne in mind; see note (*x*) at p. 101.

(*s*) Copyright Act, 1911, s. 36.

(*t*) *Ibid.* s. 31.

(*u*) "Literary work" includes maps, charts, plans, tables, and compilations. See *Libraco* v. *Shaw Walker* [1913] 30 T. L. R. 22. *Anderson* v. *Lieber* [1917] 2 K. B. 467 (cable code); *London Univ.* v. *Univ. Tutorial Press* [1916] 2 Ch. 601 (examination papers); *Blacklock* v. *Pearson* [1915] 2 Ch. 376 (an index).

(*x*) "Dramatic work" includes any piece for recitation, choreographic work, or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting forms or the combination of incidents represented gives the work an original character.

musical (*y*), or artistic (*z*) work, or any substantial part thereof, or to perform (*a*) or deliver (*b*) in public the work or any substantial part thereof, and also the sole right (1) to produce or publish a translation (*c*), (2) to convert a dramatic work into a novel or similar form, (3) to dramatise a novel, and (4) to make any record, perforated roll, cinematograph film (*d*) or other contrivance for mechanically performing or delivering any literary, dramatic, or musical work (*e*).

There is, however, no such right of property as an exclusive right to take photographs (*f*).

The right in respect of a published work arises if it is first published within the British Empire;

(*y*) "Musical work" is not defined. Cf. Musical Copyright Act, 1906.

(*z*) "Artistic work" includes works of painting, drawing, sculpture, artistic craftsmanship and architectural works of art, and engravings and photographs. See *Stephenson* v. *Grant* [1917] 86 L. J. Ch. 93. In the C. A. the Court refused to consider the points raised on the ground that they were abstract points of law [1917] 86 L. J. Ch. 439.

(*a*) Performance means acoustic or visual representation, including representation by mechanical instrument.

(*b*) Delivery includes the delivery of a lecture by a mechanical instrument.

(*c*) *Byrne* v. *Statist Co.* [1914] 1 K. B. 622.

(*d*) To prove a film, a person who has seen it performed must be called; it is not sufficient to produce the film itself in Court. *Glyn* v. *Western Feature Film Co.* [1916] 1 Ch. 261.

(*e*) Copyright Act, 1911, s. 1 (2). For works existing when the Act was passed see s. 24.

(*f*) *Sports, &c., Agency* v. *Our Dogs, &c., Co.* [1916] 2 K. B. 880.

in respect of an unpublished work then if the author is a British subject or was resident or domiciled within the British Empire when he made the work (*g*). There can be no copyright in treasonable, seditious, immoral or indecent works (*h*).

Publication is the issue of copies to the public; but the public performance of a play, musical work, &c., the public delivery of a lecture, the public exhibition of a work of art, and the construction of a work of architecture do not constitute publication, nor does the issue of photographs, &c., of works of art or architecture (*i*).

The **period** of copyright is the life of the author and fifty years (*k*). If the work is posthumous the period is until publication and fifty years afterwards (*l*). If the work is produced by joint authors, then the period is the life of the one who dies first and fifty years, or the life of the one who dies last, whichever period is the longer. If one or more of the authors of a joint work is not entitled to copyright, then the period is calculated as if the other author or authors were alone concerned (*m*). In the case of mechanical

(*g*) Copyright Act, 1911, ss. 1 (1), 35 (5). For the colonies and foreign countries see ss. 23, 25-30.
(*h*) *Glyn* v. *Western Feature Film Co.* [1916] 1 Ch. 261.
(*i*) Copyright Act, 1911, s. 1 (3).
(*k*) *Ibid.* s. 3.
(*l*) *Ibid.* s. 17.
(*m*) *Ibid.* s 16.

reproductions of sound the period is fifty years from the making of the original record (*n*), and in the case of photographs fifty years from the making of the original negative (*o*).

The author is deemed to be the **owner** of the copyright (*p*) and he may assign it by a written document signed by himself or his agent for a period not exceeding twenty-five years after his death. At the end of the time, the copyright revests in his personal representatives (*q*). But in the absence of special agreement the author is not the owner—

(1) When he produces a portrait, photograph or engraving on the order of a person who gives valuable consideration for it. Such person is the owner.

(2) When he is an employee or apprentice. His master is the owner.

(3) When he produces articles and contributions for newspapers, magazines, &c., but in such a case he can forbid publication in any other form (*r*).

Infringement is the interference with any rights of the owner (*s*), and the infringer may be proceeded against by civil action or criminal pro-

(*n*) Copyright Act, 1911, s. 19.
(*o*) *Ibid.* s. 21.
(*p*) *Ibid.* ss. 5 (1), 17 (2).
(*q*) *Ibid.* s. 5 (2).
(*r*) *Ibid.* s. 5 (1).
(*s*) *Corelli* v. *Gray* [1913] 30 T. L. R. 116; *Harris* v. *Warren* [1918] 87 L. J. Ch. 491.

ceedings (*t*). No damages can be claimed against an innocent infringer (*u*). Infringing copies become the property of the owner of the copyright (*x*). The owner of copyright in an architectural work of art has no right to restrain the building or compel the demolition of a construction infringing his copyright, nor does the construction become his property (*y*).

The Act expressly declares infringement to include (1) sale or hire or exposure for sale or hire by way of trade; (2) distribution for trade or other purposes; (3) exhibition in public for trade purposes; and (4) importation for sale or hire (*z*); but it does not include (1) fair dealing for private study (*a*), research, criticism, review or newspaper summary; (2) the use by the author (not being owner) of any plan, model, &c., made for the purpose of the work provided he does not repeat or imitate the main design; (3) the making or publishing of paintings, &c., of sculptures or works of artistic craftsmanship if permanently situate in a public place or building, or of works of architecture (provided that such paintings,

(*t*) Copyright Act, 1911, ss. 6—12. One co-owner in a proper case can bring proceedings against the other: *Cesinsky* v. *Routledge* [1916] 2 K. B. 325.

(*u*) *Ibid.* s. 8.

(*x*) *Ibid.* s. 7. This section gives a remedy in addition to s. 6; *Birn* v. *Keen* [1918] 2 Ch. 281.

(*y*) *Ibid.* s. 9.

(*z*) *Ibid.* s. 2 (2).

(*a*) *London Univ.* v. *Univ. Tutorial Press* [1916] 2 Ch. 601.

&c., are not architectural drawings or plans); (4) publishing extracts of a literary work in a collection (mainly non-copyright) for the use of schools, but not more than two extracts from one author may be published by the same publisher within five years and the source must be publicly acknowledged; (5) publishing reports of lectures, unless expressly forbidden; (6) reading or reciting in public by one person of a reasonable extract of a published work (*b*); (7) reporting in a newspaper a political speech delivered in public (*c*).

The owner of a copyright cannot prevent publication in certain instances. Thus, twenty-five years after the death of the author (thirty years in the case of a book published before the Act was passed) any one may publish provided he gives a prescribed notice and pays a royalty of 10 per cent. of the published price (*d*). In the case of a literary, dramatic, or musical work the Judicial Committee may, at any time after the author's death, grant upon terms a licence to an applicant who can prove that, by reason of the owner of the copyright refusing to republish or allow republication or performance, the work has been withdrawn from the public (*e*).

(*b*) Copyright Act, 1911, s. 2 (1).
(*c*) *Ibid.* s. 20.
(*d*) *Ibid.* s. 3.
(*e*) *Ibid.* s. 4.

Mechanical reproduction of musical works is freely allowed. Under regulations of the Board of Trade (*f*) any one can make records upon giving prescribed notice and paying a prescribed royalty (*g*).

The Act does not apply to designs (*h*).

A trade mark (*i*) is a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof used or intended to be used upon or in connection with goods in order to indicate that they are the goods which the proprietor of the trade mark has manufactured, selected, certified, dealt with, or offered for sale (*k*).

A trade mark must contain or consist of at least one of the following essentials:—

(1) The name of a company, individual or firm indicated in a special or particular manner;

(2) The signature of the proprietor or of some predecessor in his business;

(3) An invented word or invented words (*l*);

(*f*) *Monckton* v. *Pathé* [1914] 1 K. B. 395.

(*g*) Copyright Act, 1911, s. 19. But this right does not mean that the person making the record has a right to infringe the copyright in other respects: *Chappell* v. *Columbia Graphophone Co.* [1914] 2 Ch. 745 (C. A.).

(*h*) *Ibid.* s. 22. The Acts relating to designs are the Patents and Designs Acts, 1907 to 1919.

(*i*) The Acts governing trade marks are the Trade Marks Act, 1905 (5 Edw. VII. c. 15) and 1919 (9 & 10 Geo. V. c. 79).

(*k*) *Major* v. *Franklin* [1908] 1 K. B. 712.

(*l*) *In re Carl Lindstroem* [1914] 1 Ch. 103; *In re Magnolia Metal Co.* [1897] 2 Ch. 497; *In re Gestetner* [1908] 1 Ch. 513;

(4) A word or words having no direct reference to the character (*m*) or quality (*n*) of the goods, and not being a geographical name (*o*) or surname (*p*);

(5) Any other distinctive mark (*q*).

A trade mark must be **registered** (*r*), and pro-

Re Leopold Casella [1910] 26 T. L. R. 472; *Re Williams* [1917] 86 L. J. Ch. 273.

(*m*) A word which is the only practicable name of a chemical element or compound (not mixture) cannot be used, unless only used to distinguish it from other marks and in connection with a suitable and practicable name open to public use (Trade Marks Act, 1919, s. 6).

(*n*) Such as "perfection"; *In re Crosfield* [1910] 1 Ch. 130; "standard": *Standard Ideal Co.* v. *Standard, &c., Co.* [1911] A. C. 78; "national": *Re National Galvanisers* [1920] 36 T. L. R. 783, and "classic": *Sharp* v. *Solomon* [1915] 84 L. J. Ch. 290; but see *In re Actiebolaget Hjorth* [1910] 2 Ch. 64.

(*o*) A name which is a geographical name in a foreign language may be used in a proper case: *Re Berna Commercial Motors* [1915] 1 Ch. 414.

(*p*) *In re Lea* [1913] 1 Ch. 446; but see *Re Teofani* [1913] 2 Ch. 565; and *Re Cadbury* [1915] 1 Ch. 131; and cf. *In re California* [1910] 1 Ch. 130.

(*q*) *Re Gramophone Co.* [1910] 2 Ch. 423; *Re Garrett* [1916] 1 Ch. 436. As to a surname see *Re Burford* [1919] 2 Ch. 28; *Cording* v. *Cording* [1916] 85 L. J. Ch. 742. As to letters see *Registrar of Trade Marks* v. *Du Cros* [1913] A. C. 624. A design which is capable of registration as such under the Patents and Designs Act can nevertheless be registered as a trade mark: *Re U. S. Playing Card Co.* [1908] 1 Ch. 197.

(*r*) The Register is now divided into two Parts, A. and B. Part A. consists of all trade marks registered before April 1, 1920, and those registered after that date under the Act of 1905. Part B. consists of all trade marks registered under Part I. of the Act of 1909: Trade Marks Act, 1919, ss. 1-5. Assignments may be registered: Trade Marks Act, 1905, s. 33, as amended by Trade Marks Act, 1919, s. 11.

vision is made for opposition to any application, and correction and rectification of the register. The registration must be renewed every **fourteen** years. A trade mark can only be assigned in connection with the business in respect of which it is used (*s*). And only the owner can sue for an infringement (*t*).

The same trade mark can be registered by different persons for different classes of goods, but not for the same classes, except what are known as pre-1875 marks (*u*). A series of trade marks, *i.e.*, trade marks resembling one another in material particulars but with minor differences, may be registered together.

Registration is *primâ facie* evidence of the validity of a trade mark for seven years, and afterwards is conclusive evidence except in the case of fraud or where it is likely to deceive the public (*x*).

Where the infringement is innocent the only remedy is an injunction, not damages (*y*).

The property in a trade mark is the exclusive

(*s*) *Lecouturier* v. *Rey* [1910] A. C. 262.

(*t*) *Ullmann* v. *Leura* [1908] A. C. 443.

(*u*) *Re Gutta Percha, &c, Co.* [1909] 2 Ch. 10.

(*x*) Cf. *Re McGlennon* [1908] 25 T. L. R. 23; *Re Royal Worcester, &c., Co.* [1909] 1 Ch. 459. Registration in Part B. is only *primâ facie* evidence at all times : Trade Marks Act, 1919, s. 4. As to what is calculated or likely to deceive, see *Re Maeder* [1916] 1 Ch. 304 and *Boord* v. *Bagots* [1916] 2 A C. 382.

(*y*) *Slazenger* v. *Spalding* [1910] 1 Ch. 257.

right to the use of the mark in respect of a particular class of goods, and consequently does not include the right to restrain the use of the same mark in respect of a different class of goods.

Where the trade mark used in connection with a patented article is the name or only practicable name of that article, then all rights to the exclusive use of the trade mark cease with the patent under which it is manufactured (*z*).

It is unlawful to use the royal arms in connection with a business, unless the firm holds the royal warrant (*a*).

Trade Marks should be distinguished from **Trade Names** (*b*). Where a manufacturer (*c*) makes an article and sells it under a certain name so that it comes in the trade to mean the article made by him and nothing else, no trader is entitled to use that name in connection with his goods so as to be likely to deceive purchasers (either from him or from persons to

(*z*) Trade Marks Act, 1919, s. 6.

(*a*) Trade Marks Act, 1905, s. 68 : *Royal Warrant Holders Association* v. *Deane* [1912] 1 Ch. 10; *Royal Warrant Holders Association* v. *Sullivan* [1914] 1 Ir. R. 236.

(*b*) A trade name need not be registered, but if used as a business name it must be registered under the Registration of Business Names Act, 1916; *Daniel* v. *Rogers* [1918] 2 K. B. 228.

(*c*) Including an agent where the goods are identified with his name : *Dental Manufacturing Co.* v. *De Trey* [1912] 3 K. B. 76.

whom he sells his goods) (*d*). The rule applies even where no name is attached, but the public have come to know a particular manufacturer's goods by their special "get up" provided it is quite distinctive (*e*). It is not necessary to prove an actual intent to deceive (*f*), and, probably, not even actual damage (*g*). One trader cannot, without infringing the rights of another trader, represent goods which are not that other trader's goods or are not that other trader's goods of a particular class or quality to be that other trader's goods or that other trader's goods of that particular class or quality (*h*). A trader cannot insist upon the exclusive use of a name or word, if he thereby prevents others selling patented articles after the patent has expired (*i*). The name may be a surname. A person who does not bear that name (*k*), and even one who does bear

(*d*) *Reddaway* v. *Banham* [1896] A. C. 199; *Burberrys* v. *Cording* [1909] 25 T. L. R. 576; *Warwick* v. *New Motor, &c., Co.* [1910] 1 Ch. 248; *Horlick* v. *Summershill* [1917] 86 L. J. Ch. 175; but see *Harris* v. *Warren* [1918] 87 L. J. Ch. 491.

(*e*) *Birmingham Vinegar Co.* v. *Powell* [1897] A. C. 715; *Hunt* v. *Ehrmann* [1910] 2 Ch. 198; *Edge* v. *Niccolls* [1911] A. C. 693.

(*f*) *Saxlehner* v. *Apollinaris Co.* [1897] 1 Ch. 893; *Ewing* v. *Buttercup Co.* [1917] 2 Ch. 1; *Pullman* v. *Pullman* [1919] 36 R. P. C. 240.

(*g*) *Warwick* v. *New Motor Co.* [1910] 1 Ch. 248.

(*h*) *Spalding* v. *Gamage* [1915] 84 L. J. Ch. 449.

(*i*) *Linoleum Manufacturing Co.* v. *Nairn* [1878] 7 Ch. D. 834; and see now, Trade Marks Act, 1919, s. 6, *ante*, p. 114.

(*k*) *Valentine* v. *Valentine* [1900] 83 L. T. 259; *Yeatman* v. *Homberger* [1913] 107 L. T. 742. As to companies, see

it (*l*), will be restrained from using it unless he clearly distinguishes it so as to avoid all chance of deceit (*m*). In the absence of express agreement, an ex-employee cannot be prevented from advertising the fact that he was so employed (*n*).

In certain cases, a person will be restrained from using a business qualification to which he has no right (*o*).

The right to restrain use of trade names belongs only to the owner, an exclusive agent for sale cannot sue for an infringement of the owner's trade name (*p*).

Standard Bank of South Africa v. *Standard Bank* [1909] 25 T. L. R. 420; *Scottish Union, &c., Insce. Co.* v. *Scottish National Insce. Co.* [1909] S. C. 318; *Elliott* v. *Expansion of Trade* [1909] 54 S. J. 101. There is no right to the name of a book: *Dicks* v. *Yates* [1881] 18 Ch. D. 76: *Crotch* v. *Arnold* [1909] 54 S. J. 49; or of a newspaper: *Outram* v. *London Evening Newspaper* [1911] 27 T. L. R. 231; or a magazine: *Stevens* v. *Cassell* [1911] 27 T. L. R. 272, unless the name has become identified with plaintiff and the get-up is imitated.

(*l*) *Cash* v. *Cash* [1902] 86 L. T. 211; *Brinsmead* v. *Brinsmead* [1913] 29 T. L. R. 706. The rule includes companies: *Kingston Miller* v. *Kingston* [1912] 1 Ch. 575; *Lloyd's Bank* v. *Lloyd's Investment Trust Co.* [1912] 28 T. L. R. 279; *Lloyds and Dawson* v. *Lloyds Southampton* [1912] 28 T. L. R. 528. Injunctions were refused in *Waring & Gillow* v. *Gillow & Gillow* [1916] 32 T. L. R. 389; and in *Buttons, Ltd.* v. *Buttons Covered, Ltd.* [1920] 37 R. P. C. 45.

(*m*) *Cash* v. *Cash* [1902] 86 L. T. 211.

(*n*) *Cundey* v. *Lerwill* [1908] 99 L. T. 273.

(*o*) *Society of Accountants* v. *Goodway* [1907] 1 Ch. 489; but see *Society of Architects* v. *Kendrick* [1910] 162 L. T. 526.

(*p*) *Dental Manufacturing Co.* v. *De Trey* [1912] 3 K. B. 76.

CHAPTER VI.

OF LOSS OF SERVICE, SEDUCTION, CONSPIRACY, MAINTENANCE, AND CHAMPERTY.

Loss of Service.—Every person who knowingly and designedly interrupts the relation subsisting between master and servant (1) by procuring the servant to depart from the master's service, or (2) by harbouring and keeping him as servant after he has quitted his place and during the stipulated period of service, whereby his master is injured, commits a wrongful act, for which he is responsible in damages (*a*). In *Lumley* v. *Gye* (*b*), the plaintiff, the manager of a theatre, sued defendant, a rival manager, for inducing a third party to break an engagement to sing at plaintiff's theatre. Held, plaintiff entitled to recover.

Prior to *Lumley* v. *Gye*, **it used to be thought:** —(1) as Coleridge, J., held, in his dissenting

(*a*) See judgment of Crompton, J., in *Lumley* v. *Gye* [1853] 2 E. & B. 216; *Evans* v. *Walton* [1867] L. R. 2 C. P. 615.
(*b*) [1853] 2 E. & B. 216.

judgment, that such an action only lay where the strict relationship of master and servant was proved. (*Bowen* v. *Hall* (*c*) confirmed *Lumley* v. *Gye*, Lord Coleridge, C.J., dissenting on the same grounds as Coleridge, J., had done before him.) (2) That the damage sued for must have been the legal consequence of defendant's act (*d*). Thus, if A. slander B. to a mob, who, in consequence, throw B. into a horse-pond, according to this view B. could not recover for such damage as against A. But *Lumley* v. *Gye* altered this rule, and allowed the wrongful act of a third party to form part of the damage, if such act would naturally arise from defendant's conduct.

Action of Seduction.—This action is a variety of the last-mentioned action, but in its modern development the service on the loss of which the action is based is a fiction (*e*). The proper person to sue is the master of the girl seduced and the cause of action is the loss of the benefit of her services by the defendant's wrongful act. He need not prove an express contract of service, nor need he prove that the defendant was aware of the service. If the plaintiff is the father and the girl is under age and not in actual service with another, service is presumed.

(*c*) [1881] 6 Q. B. D. 333; approved and followed in *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A. C. 239.

(*d*) See *Vicars* v. *Wilcocks* [1806] 8 East, 1.

(*e*) See *Postlethwaite* v. *Parkes* [1766] 3 Burr. 1378.

"It is sufficient that the daughter was living with her father, forming part of his family and liable to his control and command." "The right to the service is sufficient" (*f*).

Thus, it has been held that, where a girl had been dismissed from her employment, she was in her father's service while on her way home and before she reached home (*g*).

If the plaintiff is not the father, or his child is not under age, provided she be living under plaintiff's roof as one of the family, service will be presumed from slight acts of household duty, *e.g.*, milking cows or making tea (*h*).

On the other hand, if the girl was in the service of a third party or of the defendant, the mere fact that she occasionally assisted in home duties does not create the relation of master and servant between her father and herself so as to entitle the father to maintain an action, for, as Kelly, C.B., said in *Hedges* v. *Tagg* (*i*), "It has been truly said that the action of seduction is founded on a fiction; but for that fiction, there must be some foundation, however slender in fact."

(*f*) Per Littledale, J., in *Maunder* v. *Venn* [1829] Moo. & M. 323.

(*g*) *Terry* v. *Hutchinson* [1868] L. R. 3 Q. B. 599.

(*h*) Per Buller, J., in *Bennett* v. *Alcott* [1787] 2 T. R. at p. 168.

(*i*) [1872] L. R. 7 Ex. at p. 205, cited with approval by Vaughan Williams, L.J., in *Whitbourne* v. *Williams* [1901] 2 K. B. at pp. 724, 725.

The relationship of master and servant must have existed—

1. At the time of seduction; and

2. At the time of illness and loss of service.

In *Davies* v. *Williams* (*k*), where a girl was seduced while in the service of one master, and became ill during her service with another, it was held that the seducer was not liable. Similarly, where the girl was living with her father when seduced, and he died before her illness, at which time she was living with her mother, it was held that no action lay (*l*).

If plaintiff has encouraged profligate persons, or otherwise caused his own injury, he has no ground of action (*m*).

The damages are exemplary or vindictive, *i.e.*, not merely for the actual damage sustained, but for the anxiety, distress, loss of society and comfort suffered by the plaintiff, and for the dishonour brought upon him (*n*). If, however, the master, not parent, sues, the measure of damages is the actual loss (*o*).

Though no action for seduction lies against a master for seducing his servant, yet this

(*k*) [1848] 10 Q. B. 725.

(*l*) *Hamilton* v. *Long* [1905] 2 Ir. R. 552; approved in *Peters* v. *Jones* [1914] 2 K. B. 781.

(*m*) *Reddie* v. *Scoolt* [1794] 1 Peake, 316.

(*n*) Per Lord Eldon, in *Bedford* v. *McKowl* [1809] 3 Esp. at p. 120.

(*o*) *McKenzie* v. *Hardinge* [1906] 23 T. L. R. 65.

exemption will not cover the case of mere **colourable hiring** for the express purpose of seduction (*p*).

Conspiracy. — Conspiracy is an agreement between two or more persons to do an unlawful act or to effect a lawful purpose by improper means. The agreement itself is a crime, but does not amount to a tort unless actual damage is caused (*q*). But a conspiracy to defame which is carried out by the publication of defamatory words actionable *per se*, and therefore presumed by the law to cause damage, is actionable even if no special damage is caused (*r*).

In recent years there have been very important decisions of the House of Lords (*s*) and the Court of Appeal (*t*) on the law of conspiracy, which have been followed by the Trade Disputes Act,

(*p*) *Speight* v. *Oliviera* [1819] 2 Stark. 493; 20 R. R. 728.

(*q*) See *Quinn* v. *Leathem* [1901] A. C. 495; cf. *Larkin* v. *Long* [1915] A. C. 814; *Thomas & others* v. *Moore & others* [1918] 1 K. B. 585 (C. A.); see also *Giblan* v. *National Labourers' Union* [1903] 2 K. B. 600; *National Phonograph Co.* v. *Edison Bell* [1908] 1 Ch. 369; *Ward Lock* v. *Op. Co.* [1906] 22 T. L. R. 329 and Clerk and Lindsell on Torts, 6th ed. pp. 25-27.

(*r*) See Clerk and Lindsell on Torts, 6th ed. pp. 25-27; *Gregory* v. *Duke of Brunswick* [1843] 6 Man. & G. 205.

(*s*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A. C. 25; *Allen* v. *Flood* [1898] A. C. 1; *Quinn* v. *Leathem* [1901] A. C. 495; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A. C. 239.

(*t*) *Temperton* v. *Russell* [1893] 1 Q. B. 715; *Giblan* v. *National Labourers' Union* [1903] 2 K. B. 600.

1906 (*u*). The following propositions appear to be deducible therefrom (*x*):—

1. An act which is in itself lawful cannot be converted into an unlawful act so as to render the doer of the act liable to a civil action merely because it is done with a bad motive (*y*).

2. If without legal excuse A. induces B. to break a contract with C. whereby C. suffers damage, A. is liable to C.; or if A. by means of intimidation or coercion compels B. to cease dealing with C. or to leave C.'s employment and C. is thereby damaged, A. is liable to C., even though B. has not broken any contract with C. (*z*). It is no legal excuse for A. to show that he had no malice against C., and that he induced B. to break his contract with C. *bonâ fide* in the supposed interests of B. (*a*).

(*u*) 6 Edw. 7, c. 47. This Act has been followed by statutory provisions designed to settle disputes between employers and workmen in certain trades by special procedure. See, e.g., the Trade Boards Act, 1909 (9 Edw. 7, c. 22).

(*x*) For the first four of these propositions I am mainly indebted to the interesting article by Mr. A. V. Dicey, K.C., on this difficult subject in the Law Quarterly Review, vol. xviii. pp. 1-6.

(*y*) *Allen* v. *Flood*, *supra;* per Lord Macnaghten in *Quinn* v. *Leathem* [1901] A. C. at pp. 508, 509; and *Read* v. *Friendly Society of Operative Stonemasons* [1902] 2 K. B. 732 (C. A.); *Davis* v. *Thomas* [1920] 2 Ch. 189.

(*z*) *Lumley* v. *Gye*, *Bowen* v. *Hall*, *Temperton* v. *Russell*, *Quinn* v. *Leathem*, *Giblan* v. *National Labourers' Union*, *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, *supra;* *José* v. *Metallic Roofing Co.* [1908] A. C. 514.

(*a*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*,

3. Acts which are done by A. and B., who are acting in concert, solely with the lawful object of preserving and developing their trade and increasing their profits, and which do not necessitate the employment of any means in themselves unlawful, are not actionable even though these acts cause damage to C. (*b*).

4. A combination of A. and B. to damage C. in his trade, and by means of coercion or intimidation to induce C.'s customers or servants against their will to break their contracts with him or not to deal with him, or not to continue in his employment, was settled by *Quinn* v. *Leathem* (*c*) to be actionable, provided it causes damage to C. Threats not only of bodily harm, but also of serious annoyance and damage, amount to such coercion or intimidation (*d*).

5. But now by the **Trade Disputes Act, 1906** (*e*), an act done in pursuance of an agreement or combination by two or more persons shall not, **if done in contemplation or further-**

supra; National Phonograph Co. v. *Edison Bell Co.* [1908] 1 Ch. 335.

(*b*) Per Bowen, L.J., in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1889] 23 Q. B. D. at pp. 613, 614, Lord Watson, in S. C. [1892] A. C. at pp. 40-44, and Lord Hannen, *ibid.*, at p. 59; *Cade* v. *Daly* [1910] 1 Ir. R. 396.

(*c*) [1901] A. C. 495; *Pratt* v. *British Medical Association* [1919] 1 K. B. 244.

(*d*) Per Lord Lindley in *Quinn* v. *Leathem* [1901] A. C. at p. 540.

(*e*) 6 Edw. 7, c. 47, s. 1; and see *supra*, p. 14.

ance of a trade dispute, be actionable unless the act, if done without any such agreement or combination, would be actionable. An injunction will not be granted to restrain an act which if done would not be actionable by reason of this Act (*f*).

6. And moreover an act done by a **single individual** shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person or with the right of some other person to dispose of his capital or his labour as he chooses when such act is done **in contemplation or furtherance of a trade dispute** (*g*).

The last two propositions do not entirely destroy the effect of the first four, as they only apply to a **trade dispute,** which means "any dispute between employers and workmen, which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person" (*h*). For all other purposes the first four propositions are still good law.

(*f*) *Ware & De Freville* v. *Motor Trade Association* [1921] 37 T. L. R. 213.

(*g*) 6 Edw. 7, c. 47, s. 3; and see *Conway* v. *Wade* [1909] A. C. 506; *Larkin* v. *Long* [1915] A. C. 814.

(*h*) *Ibid.* sect. 5; *Conway* v. *Wade*, *supra*; and see *supra*, p. 14.

Maintenance and Champerty (*i*). — These wrongs are akin to malicious prosecution and other abuses of legal process. If A., without reasonable and probable cause, instigates B. to bring an action against C., A. is liable to C. in damages (*k*); for a person is not entitled to assist another's action, unless he has a common interest (*l*) or acts from motives of kindred, affection or charity in aiding him (*m*). It is immaterial whether the action is successful or not, but actual damage must be caused (*n*), so that if a person is unsuccessful in an action of fraud and damages and costs are awarded against him, no damage is caused by anyone maintaining the action, for the damages and costs are the consequence of his fraud and of his resisting a claim rightly made against him (*n*). Motives of charity with or without reasonable ground afford a good defence to an action for maintaining the suit even of a stranger (*o*). Such

(*i*) Pollock, 11th ed. pp. 338, 339.

(*k*) *Flight* v. *Lemon* [1843] 4 Q. B. 883; *Pechell* v. *Watson* [1841] 8 M. & W. 691.

(*l*) *Ford* v. *Radford* [1920] 36 T. L. R. 658.

(*m*) *Alabaster* v. *Harness* [1895] 1 Q. B. 339 (C. A.); *Bradlaugh* v. *Newdegate* [1883] 11 Q. B. D. 1; *Scott* v. *N. S. P. C. C.* [1909] 25 T. L. R. 789 (master and servant); *British, &c., Conveyors* v. *Lamson* [1908] 1 K. B. 1006. As to trade unions, see *Oram* v. *Hutt* [1914] 1 Ch. 98, and *supra*, pp. 14, 123.

(*n*) *Neville* v. *London Express Newspaper, Ltd.* [1919] A. C. 368, where the cases are reviewed.

(*o*) *Harris* v. *Briscoe* [1886] 17 Q. B. D. 504; *Holden* v. *Thompson* [1907] 2 K. B. 489.

"charity may be indiscreet but it must not be mercenary" (*p*). The doctrine of maintenance does not apply to criminal proceedings (*q*). Champerty is that variety of maintenance where the consideration for the assistance is a share in the subject-matter of the action (*r*). An assignment of damages to be recovered in a pending action of tort has been held to be lawful (*s*). There is nothing illegal in a sale by one person to another of information likely to lead to the recovery of property in consideration of a share of the property, if recovered. But if he contracts that he will himself recover the property or assist in recovering it or provide evidence by which it may be recovered taking as remuneration a share of the property, when recovered, the agreement is illegal and void (*t*).

(*p*) *Cole* v. *Booker* [1913] 29 T. L. R. 295.
(*q*) *Grant* v. *Thompson* [1895] 72 L. T. 264.
(*r*) *Wild* v. *Simpson* [1919] 2 K. B. 544.
(*s*) *Glegg* v. *Bromley* [1912] 81 L. J. K. B. 1081; and see *Ellis* v. *Torrington* [1920] 1 K. B. 399.
(*t*) Per Parker, J., in *Wedgerfield* v. *de Bernardy* [1908] 24 T. L. R. at p. 497 (affirmed, C. A. [1908] 25 T. L. R. 21). See also *Rees* v. *de Bernardy* [1896] 2 Ch. 437; *Danzey* v. *Metropolitan Bank* [1912] 28 T. L. R. 327; *In re Hoggart's Settlement* [1912] 56 S. J. 415.

CHAPTER VII.

OF LIBEL AND SLANDER (*a*).

A **defamatory statement** is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession, or trade. Such statement, if in writing, printing, or other permanent form, constitutes **a libel**; if in spoken words or significant gestures, **a slander.**

The distinction between libel and slander carries with it many important consequences. Thus, libel is both a civil wrong and a criminal offence. On the other hand, slander is a civil wrong only, though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene, or as being a solicitation to commit a crime, or as being a contempt of court. Again, where a defamatory statement is written or printed, the law presumes

(*a*) This chapter is mainly taken from the Author's "Principles and Practice of the Law of Libel and Slander," 5th ed., Butterworth & Co., London, 1917.

that of necessity the person defamed has suffered damage, and in the absence of legal justification or excuse the publication of such a statement is wrongful. On the other hand, spoken words are actionable only when they produce, as a natural consequence, the loss of some definite temporal advantage, or, as it is called, special damage, or when they come within certain specified categories (*b*).

It is sometimes said that libel can be distinguished from slander by the fact that the former is addressed to the eye, the latter to the ear. This is, no doubt, true as a general rule, but there appears to be at least one exception to it—the case of a defamatory statement communicated by significant gestures—*e.g.*, the finger language of the deaf and dumb. Such a case, so far as the author is aware, has never arisen, but it is submitted that it would be governed by the same rules as spoken words, and would therefore come under the description of slander. The real distinction is that in the case of libel the defamatory matter is in some **permanent form**; and usually, though not necessarily, in writing or printing. For instance, a statue (*c*), caricature (*d*), effigy (*e*), chalk marks

(*b*) See p. 140, *infra*.

(*c*) Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 542.

(*d*) *Austin* v. *Culpepper* [1684] 2 Show. 313.

(*e*) 5 Rep. 125; *Eyre* v. *Garlick* [1878] 42 J. P. 68; *Monson* v. *Tussauds, Limited* [1894] 1 Q. B. 671.

on a wall (*f*), "signs or pictures, as by fixing up a gallows on a man's door, or painting him in a shameful and ignominious manner" (*g*), may constitute a libel. Slander, on the other hand, is in its nature **transient,** and is always in the form of spoken words or significant gestures.

In order to be defamatory the words must refer to some particular individual, and the plaintiff must prove that he is that particular individual. In other words, there must be a definite imputation on a definite person. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" (*h*). Even if the words are not intended to refer to the plaintiff, but the jury find that reasonable people who knew the plaintiff thought that he was referred to, it is enough (*i*). And, provided that the plaintiff can satisfy the jury that he was especially referred to, it is sufficient (*k*), whether the words complained of describe him by his own name, or its initial letter (*l*), or by asterisks (*m*),

(*f*) *Tarpley* v. *Blabey* [1836] 7 C. & P. 295.
(*g*) Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 542.
(*h*) Per Willes, J., in *Eastwood* v. *Holmes* [1858] 1 F. & F. 349.
(*i*) *Hulton* v. *Jones* [1910] A. C. 20; *Smith* v. *Sievier*, "Times" Newspaper, July 7th, 1910.
(*k*) *Lawrence* v. *Newberry* [1891] 64 L. T. 797.
(*l*) *Roach* v. *Garvan* [1742] 2 Atk. 469; *O'Brien* v. *Clement* [1846] 15 M. & W. 435.
(*m*) *Bourke* v. *Warren* [1826] 2 C. & P. 307.

or by a fictitious name (*n*), or by the name of somebody else (*o*), or merely refer to a definite body of persons of which he is a member; for "if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated" (*p*).

But where it is uncertain whether the plaintiff was the particular individual aimed at, no action lies; *e.g.*, where, after the trial of an action at which there were three witnesses, the defendant said "One of you three is perjured," it was held that no action lay, as there was nothing to show that the plaintiff was the particular witness referred to (*q*).

Where the words are directed solely against a deceased person, *e.g.*, plaintiff's father, no civil action lies (*r*).

Further, **the words complained of must concern the plaintiff himself.** They must affect his character or touch him in the way of his profession or trade. If they are directed **solely at the plaintiff's goods or his title to property,**

(*n*) *Rex* v. *Clerk* [1729] 1 Barn. 304.

(*o*) *Levi* v. *Milne* [1827] 4 Bing. 195.

(*p*) Per Lord Campbell, C.J., in *Le Fanu* v. *Malcolmson* [1848] 1 H. L. C. 668.

(*q*) *Sir John Bourne's case*, cited Cro. Eliz. 497; see also *James* v. *Redditch* [1599] 4 Rep. 17.

(*r*) *Rex* v. *Darby* [1687] 3 Mod. 139; *Broome* v. *Ritchie* [1904] 6 Fraser (Sc.), 942.

though an action may lie therefor, it is not an action for libel or slander, but "an action on the case for special damage sustained by reason of the speaking or publication" (*s*). In some cases, however, an attack on a man's title to property or goods may also injuriously affect his reputation. Thus, it is libellous to write and publish of a bookseller that he sells immoral poems (*t*); and to say of a wine-merchant that his wine is poisoned, or of a tea-dealer that his tea is made green by drying it on copper (*u*), or of a fishmonger that he is in the habit of selling decomposed fish (*x*), is a slander upon him in the way of his trade.

The matter complained of must be of a disparaging nature. Thus, it has been held **libellous** to write of a man that he is a man of straw (*y*), a hypocrite (*z*), a rascal (*a*), an impostor (*b*), that he is dishonest (*c*), ungrateful (*d*), im-

(*s*) Per Tindal, C.J., in *Malachy* v. *Soper* [1836] 3 Bing. N. C. 371; *Griffiths* v. *Benn* [1911] 27 T. L. R. 346; and see pp. 178, 179, *infra*.

(*t*) *Tabart* v. *Tipper* [1808] 1 Camp. 350; 10 R. R. 698.

(*u*) Per Coltman, J., in *Ingram* v. *Lawson* [1840] 6 Bing. N. C. at p. 216.

(*x*) Per Lord Halsbury, L.C., in *Linotype Co.* v. *British, &c., Co.* [1899] 81 L. T. at p. 333.

(*y*) *Eaton* v. *Johns* [1842] 1 Dowl. N. S. 602.

(*z*) *Thorley* v. *Lord Kerry* [1812] 4 Taunt. 355.

(*a*) *Villers* v. *Monsley* [1769] 2 Wils. 403.

(*b*) *Campbell* v. *Spottiswoode* [1863] 3 B. & S. 769.

(*c*) *Austin* v. *Culpepper* [1684] Skin. 123.

(*d*) *Cox* v *Lee* [1869] L. R. 4 Ex. 284.

pecunious (*dd*), insane (*e*), and even in one case, that his conduct has been unfeeling (*f*). So, too, ironical praise may amount to a libel (*g*), and it has been held **libellous** to publish in a newspaper a story in which the plaintiff is made to appear ridiculous, even though he has told it himself in the first instance (*h*). It is libellous to publish a story of no literary merit as having been written by an author of standing (*i*).

On the other hand, it has been held **not libellous** to write of a man that he endeavoured to discourage sedition in Ireland, for this would not injure him in the opinion of good citizens and respectable people (*j*); or that he sued his mother-in-law in a county court, for he may have properly done so (*k*); or that he owes money, for this does not imply that he cannot pay his debts (*l*); or that he is "Man Friday" (*m*), "for the man Friday, as we all know, was a respectable man" (*n*). Nor is it

(*dd*) *Eaton* v. *Johns* [1842] 1 Dowl. N. S. 602.
(*e*) *Morgan* v. *Lingen* [1863] 8 L. T. 800.
(*f*) *Churchill* v. *Hunt* [1819] 2 B. & Ald. 685.
(*g*) *Boydell* v. *Jones* [1838] 4 M. & W. 446.
(*h*) *Cook* v. *Ward* [1830] 6 Bing. 409.
(*i*) *Ridge* v. *English Illustrated Magazine* [1913] 29 T. L. R. 592.
(*j*) *Clay* v. *Roberts* [1863] 9 Jur. N. S. 580.
(*k*) *Cox* v. *Cooper* [1863] 12 W. R. 75.
(*l*) Per Bramwell, B., in *Re Coghlan* [1864] 4 F. & F. 316.
(*m*) *Forbes* v. *King* [1833] 1 Dowl. 672.
(*n*) Per Lord Denman, C.J., in *Hoare* v. *Silverlock* [1848] 12 Q. B. at p. 626.

libellous to publish the portrait of any one without his authority, even when unlike him (*o*).

In order to determine whether a statement is defamatory it must be construed in its natural and ordinary meaning; if not defamatory in such meaning it must be construed in the special meaning, if any, in which it was understood by the person by and to whom it was published (*p*).

It is for the judge to say whether the words are reasonably capable of a defamatory meaning, but for the jury to say whether under the circumstances of the case they in fact bear that meaning (*q*). In the case of *Nevill* v. *Fine Art and General Insurance Co.* (*r*), in the House of Lords it was pointed out by Lord Halsbury, L.C., that in order to justify the judge in leaving the case to the jury "the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining." "It is not enough to

(*o*) *Corelli* v. *Wall* [1906] 22 T. L. R. 532.

(*p*) *Capital and Counties Bank* v. *Henty* [1882] 7 App. Cas. 741; *Frost* v. *London Joint Stock Bank* [1906] 22 T. L. R. 760; *Beswick* v. *Smith* [1908] 24 T. L. R. 169.

(*q*) *Capital and Counties Bank* v. *Henty*, *supra*; cf. *Leon* v. *Edinburgh Evening News* [1909] S. C. 1014, and *Heaton* v. *Goldney* [1910] 1 K. B. 754.

(*r*) [1897] A. C. at pp. 76, 77.

say that by some person or another the words *might* be understood in a defamatory sense " (*s*).

Where words are reasonably capable of an innocent and a defamatory meaning it is a question of fact for the jury in what meaning they were actually understood (*t*). And in every case the burden of proof is on the party who alleges that the words were understood in a meaning other than their natural and ordinary meaning. " If the word is an ordinary English word, then the Court will construe it in its natural meaning, unless some other is shown to have been given it. If the word is a cant expression or a commercial term (*u*), then the meaning may depend upon the circumstances in evidence " (*x*). But where the words complained of are ordinary English, and perfectly intelligible on the face of them, the plaintiff cannot call witnesses to state what they understood the words to mean, unless, indeed, he first show that the words did not on this occasion bear their ordinary English meaning (*y*).

It is important to notice that where the words are not defamatory in the natural and ordinary

(*s*) [1897] A. C. at p. 73; *Stubbs* v. *Russell* [1913] A. C. 386.

(*t*) *Churchill* v. *Gedney* [1889] 53 J. P. 471; *Ritchie* v. *Sexton* [1891] 64 L. T. 210.

(*u*) *Smith* v. *Jeffreys* [1846] 15 M. & W. 561.

(*x*) Per Bramwell, B., in *Barnett* v. *Allen* [1858] 27 L. J. Ex. at pp. 414, 415.

(*y*) *Daines* v. *Hartley* [1848] 3 Ex. 200.

sense, the plaintiff must be prepared to satisfy the jury that there were facts known both to the person publishing the defamatory matter and to the person to whom it was published which would naturally lead the latter to understand the words in a defamatory sense. As was pointed out by Brett, L.J., in the well-known case of *Capital and Counties Bank* v. *Henty* (*z*), "The first question for the jury is, whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If in the opinion of the jury it would not be so read according to the *primâ facie* meaning of the language, then there is a further question (if there is any evidence upon which it can be raised), whether there were facts known both to the person who framed the alleged libel and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a second defamatory sense, it was issued ironically, or otherwise than in the primary sense of the language." In that case Messrs. Henty, some brewers at Chichester, issued to their tenants a circular containing the following words:—"Messrs. Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the

(*z*) [1880] 5 C. P. D. at p. 539 (in C. A.); *Beswick* v. *Smith* [1908] 24 T. L. R. 169.

Capital and Counties Bank." The issue of this circular caused a run upon the bank, who thereupon brought an action of libel against Messrs. Henty. It was, however, held that the words in their natural and ordinary meaning were not libellous; that therefore it was for the plaintiffs to prove that, by reason of the special circumstances of the case, they were understood in a special libellous sense; and that, in the absence of any such evidence, there was no case to go to the jury, and there must, therefore, be judgment for the defendants. Moreover, when the words are not *primâ facie* defamatory, and when the plaintiff therefore intends to maintain that the words were defamatory by reason of their being understood in a special sense, he must be careful to insert in his Statement of Claim an averment specifying the defamatory meaning of the words complained of, and showing how they come to have that meaning, and how they relate to the plaintiff (*a*). Such an averment is called an **Innuendo.** No innuendo is necessary where the words complained of are defamatory in their ordinary meaning (*b*).

No action can be maintained for libel or slander unless there be a publication, *i.e.*, a com-

(*a*) *Russell* v. *Webster* [1874] 23 W. R. 59; and see *Stubbs* v. *Russell* [1913] A. C. 386.

(*b*) Per Lord Selborne, in *Capital and Counties Bank* v. *Henty* [1882] 7 App. Cas. 748.

munication by the defendant of the words complained of to some person other than the plaintiff. Thus, there is no publication, and therefore no action will lie, if the defamatory matter be communicated only to the plaintiff. This was expressly decided in *Barrow* v. *Lewellin* (*c*), where the defendant dispatched a sealed letter through the post to the plaintiff. As Lord Esher, M.R., said in the case of *Pullman* v. *Hill & Co.* (*d*), "If the statement is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man to himself. If a letter is not communicated to anyone but the person to whom it is written, there is no publication of it." It is, however, otherwise if it can be proved that the defendant knew when he posted the letter containing the libel that it would probably be opened by some person other than the plaintiff, for example, his clerk (*e*). So, too, "if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (*f*); for example, if he shows it to his

(*c*) [1615] Hob. 62.

(*d*) [1891] 1 Q. B. at p. 527.

(*e*) *Delacroix* v. *Thevenot* [1817] 2 Stark. 63; *Gomersall* v. *Davies* [1898] 14 Times L. R. 430; *Sharp* v. *Skues* [1909] 25 T. L. R. 336 (C. A.); *Keogh* v. *Incorporated Dental Hospital* [1910] 2 Ir. R. 517.

(*f*) Per Lord Esher, M.R., in *Pullman* v. *Hill & Co.* [1891] 1 Q. B. at p. 527.

clerk, or places it in the hand of a typewriter, in order that such clerk or typewriter may copy it for him, there is a publication of the letter (*g*), though the circumstance may be such that the occasion of publication may be privileged (*h*). Similarly, it has been held that there is a publication if the libel be written on a post-card (*i*), or contained in a telegram (*k*), for in each case "it is necessarily communicated to all the clerks through whose hands it passes" (*l*).

In accordance with the common law principle that husband and wife are one person, "the uttering of a libel by a husband to his wife is no publication" (*m*). "For many purposes they are, however, essentially distinct and different persons,—and amongst others, for the purpose of having the honour and feelings of the husband assailed and injured by acts or communications made to the wife" (*n*); thus, it has been held

(*g*) *Pullman* v. *Hill*, *supra*: *Boxsius* v. *Goblet Frères* [1894] 1 Q. B. 842.

(*h*) *Edmondson* v. *Birch* [1907] 1 K. B. 371 (C. A.): distinguishing *Pullman* v. *Hill*, *supra*.

(*i*) *Robinson* v. *Jones* [1879] L. R. 4 Ir. 391; *Sadgrove* v. *Hole* [1901] 2 K. B. 1; *Huth* v. *Huth* [1915] 3 K. B. 32 (C. A.).

(*k*) *Whitfield* v. *S. E. Ry. Co.* [1858] E. B. & E. 115.

(*l*) Per Brett, J., in *Williamson* v. *Freer* [1874] L. R. 9 C. P. 393.

(*m*) Per Huddleston, B., in *Wennhak* v. *Morgan* [1888] 20 Q. B. D. at p. 537.

(*n*) Per Maule, J., in *Wenman* v. *Ash* [1853] 13 C. B. 844, 845.

that sending a defamatory letter to a wife about her husband is sufficient publication (*o*).

Is the question of publication for the judge or for the jury? It is for the jury to find whether the facts on which it is endeavoured to prove publication are true, but for the judge to decide whether the facts as proved constitute a publication.

Generally, *i.e.*, in all cases not coming within the exceptional class of cases presently to be noticed (*p*), the actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published, and the defendant will not be excused on the ground that he published the libel by accident or mistake (*q*), or in jest (*r*), or with an honest belief in its truth (*s*). Thus, the defendant was held liable in *Cook* v. *Ward* (*t*), where the plaintiff told some friends an absurd story about himself, and the defendant published it in his newspaper, simply for the purpose of amusing his readers, and believing

(*o*) *Wenman* v. *Ash* [1853] 13 C. B. 836.

(*p*) See pp. 145—152, 152—153, 160—161.

(*q*) *Blake* v. *Stevens* [1864] 11 L. T. N. S. 543; *Shepheard* v. *Whitaker* [1875] L. R. 10 C. P. 502.

(*r*) 9 Rep. 59; and *Donoghue* v. *Hayes* [1831] Hayes' Irish Ex. Rep. 265.

(*s*) *Blackburn* v. *Blackburn* [1827] 4 Bing. 395; per Maule, J., in *Wenman* v. *Ash*, *supra*; *Huntley* v. *Ward* [1859] 6 C. B. N. S. 514.

(*t*) [1830] 6 Bing. 409.

that the plaintiff would not object. And in *Blake* v. *Stevens* (*u*), the plaintiff obtained £100 damages against the defendants for the publication of a libellous statement, which had been inserted by mistake in a law book of which they were the publishers.

An action for libel lies on mere proof of publication, even though the plaintiff does not prove that he has suffered any special damage, i.e., the loss of some definite temporal advantage.

But the plaintiff, in an action for slander, must prove special damage, except in four cases—

1. Where the words charge plaintiff with having committed a **criminal** offence (*not* necessarily an **indictable** offence) which the Court has power, if it chooses, to punish by imprisonment in the first instance, as distinct from cases where the imprisonment can only be inflicted if the offender makes default in paying a fine (*x*).

2. Where they impute that the plaintiff has an infectious or contagious disease (*y*).

3. Where they are spoken of him in relation to his trade, profession, or business. Thus, it is not actionable to call a stonemason a ringleader of the nine-hours system, since this does not

(*u*) [1864] 11 L. T. N. S. 543.

(*x*) *Hellwig* v. *Mitchell* [1910] 1 K. B. 609; *Michael* v. *Spiers and Pond* [1909] 101 L. T. 382; *Webb* v. *Bevan* [1883] 11 Q. B. D. 609.

(*y*) *Villers* v. *Monsley* [1769] 2 Wils. 403.

affect him in his capacity or conduct as a stone-mason (*z*).

4. Where the plaintiff is a woman or girl, and the words impute unchastity or adultery to her (*a*).

As to repetition of libel and slander.—It is no defence to an action for libel or slander that the defendant published it by way of repetition or hearsay (*b*), or that he gave his authority for the words complained of (*c*); or except when the occasion is privileged (*d*) that he believed the words to be true (*e*). But in the case of libel it will be a good defence for the defendant to prove that he has only taken a subordinate part in disseminating the libel, and that he did not know that the document contained or was likely to contain a libel, and that he ought not to have known it, having used reasonable care (*f*).

It not infrequently happens, in cases of slander, where the words are not actionable *per se*, that the person repeating the slander is in a worse position than the person from whom he

(*z*) *Miller* v. *David* [1874] L. R. 9 C. P. 118.

(*a*) Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

(*b*) *Watkins* v. *Hall* [1868] L. R. 3 Q. B. 396.

(*c*) *M'Pherson* v. *Daniels* [1829] 10 B. & C. 263.

(*d*) See pp. 152—175, *infra*.

(*e*) Per Blackburn, J., in *Campbell* v. *Spottiswoode* [1863] 32 L. J. Q. B. at p. 202.

(*f*) Per Lord Esher, M.R., in *Emmens* v. *Pottle* (1885), 16 Q. B. D. at p. 357; and per Bowen, L.J., *ibid.* at p. 358. See also *Vizetelly* v. *Mudie's Select Library, Ld.* [1900] 2 Q. B. 170 (C. A.); *Weldon* v. *Times Book Club* [1912] 28 L. R. 143.

heard it; for if the special damage necessary to support the action flows from the repetition, and not from the original publication of the words, the repeater may alone be liable, while the originator escapes; in such a case, however, the original utterer of the slander is himself liable for the repetition (1) where he **authorises its repetition** (*g*), or (2) where he speaks in the presence of someone **under a duty to repeat** his words, knowing of the existence of such duty.

A corporation or incorporated company can sue for libel or slander (*h*). It is liable for libel or slander published by its servants or agents, where such publication has been expressly authorised (*h*), or where such libel or slander has been published in the course of the employment of such servants or agents (*i*).

The **defences** peculiar to an action of libel are four in number, viz:—

I. Justification.

II. Fair comment.

III. Privilege.

(*g*) *Watkin* v. *Hall* [1868] L. R. 3 Q. B. 396.

(*h*) *Mayor &c., of Manchester* v. *Williams* [1891] 1 Q. B. 94; *South Hetton Coal Co.* v. *N. E. News Association, Limited* [1894] 1 Q. B. 133 (C. A.).

(*i*) *Citizens' Life Assce. Co.* v. *Brown* [1904] A. C. 423; *Lloyd* v. *Grace, Smith & Co.* [1912] A. C. 716 (H. L.); see also *Finburgh* v. *Moss' Empires* [1908] S. C. 928, distinguished in *Gorman* v. *Moss' Empires* [1913] S. C. 1; *Aiken* v. *Caledonian Ry. Co.* [1913] S. C. 66.

IV. Apology. This defence is, however, only available where the libel is "contained in a public newspaper or other periodical publication."

Similar defences, with the exception of IV., are open to the defendant in an action of slander.

If a defendant in one action admits that the statements he made are defamatory and untrue, he is not thereby prevented from setting up the defences of fair comment and privilege in another action brought in respect of another publication of them (*k*).

I. Justification.

It is a good defence to an action of libel or slander that the words complained of are true (*l*).

The defendant must set out in his defence particulars of the facts upon which he relies (*m*) and, at the trial, must prove that the *whole* libel is *substantially* true. Thus, where the libel complained of is an article or paragraph preceded by a title, it is not sufficient to prove the truth of the facts stated in the article or paragraph: the title itself must be justified, or the plaintiff will

(*k*) *Mangena* v. *Wright* [1909] 2 K B. 958.

(*l*) In criminal proceedings this is not enough; the defendant must then be prepared to go further and prove that not only are the words true, but also that it is for the public benefit that they should be published.

(*m*) *Arnold* v. *Bottomley* [1908] 2 K. B. 151.

succeed. So that in *Bishop* v. *Latimer* (*n*), where a newspaper published a paragraph preceded by the title "How Lawyer B. treats his Clients," which contained a report of a case in which *one* client of Lawyer B. had been badly treated, it was held, although the case itself was accurately reported, that the title was not justified by the facts, and that the plaintiff was entitled to damages. In another case, *Clement* v. *Lewis and others* (*o*), where a newspaper had published a correct report of certain proceedings in the Insolvent Debtors Court, preceded by the title "Shameful Conduct of an Attorney," the report was held privileged, but damages were recovered for the title.

If there is gross exaggeration, the plea of justification will fail. Thus, in *Clarkson* v. *Lawson* (*p*), where the libel stated that the plaintiff, a proctor, had been three times suspended for extortion, it was held to be no justification to prove that he had been *once* so suspended. So, where the defendant had stated that the plaintiff was a "libellous journalist," it was held that a plea of justification was not supported by proof that the plaintiff had libelled one person, who had obtained judgment against him for £100 (*q*).

So if an account of a trial be published setting

(*n*) [1861] 4 L. T. N. S. 775.
(*o*) [1822] 3 Br. & Bing. 297.
(*p*) [1829—1830] 6 Bing. 266, 587.
(*q*) *Wakley* v. *Cooke and Healey* [1849] 4 Ex. 511.

out counsel's speech, and stating that the facts opened were proved, when actually the evidence only bore out part of the facts so stated, it is no defence to plead that the facts were so stated by counsel—the facts so stated must be proved true, or the defendant will fail (*r*).

On the other hand, it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel is proved to be in substance correct, and that the details, &c., which are not justified, produce no different effect on the mind of the reader than the actual truth would do (*s*). "As much must be justified as meets the sting of the charge, and if anything be contained in the charge which does not add to the sting of it, that need not be justified" (*t*). Thus, where the libel complained of was that "L., B., and G. are a gang who live by card-sharping," it was held to be sufficient justification to prove that upon two distinct occasions L., B., and G. had cheated at cards (*u*).

II. Fair Comment.

No action lies if the defendant can prove that the words complained of are a fair comment on a matter of public interest.

(*r*) *Lewis* v. *Walter* [1821] 4 B. & Ald. 605.
(*s*) *Willmett* v. *Harmer and another* [1837] 8 C. & P. 695.
(*t*) Per Burroughs, J., in *Edwards* v. *Bell* [1824] 1 Bing. at p. 409.
(*u*) *Reg.* v. *Labouchere* [1880] 14 Cox. C. C. 419.

The Court decides whether the matter commented on is one of public interest (*x*): the jury, if the Court is of opinion that there is some evidence that the comment is unfair, finds whether it is so in fact (*y*).

If the judge thinks that there is no evidence on which a rational verdict could be found to the effect that the comment is unfair or dishonest he should stop the case (*z*).

"It is incorrect to say, as some writers do, that *bonâ fide* comments on matters of public interest come under qualified privilege" (*a*). It is the right of everyone, not the privilege of any particular individual, to comment fairly and honestly on any matter of public interest (*b*), and the defence of fair comment is equally

(*x*) Per Lopes, L.J., in *South Hetton Coal Co.* v. *N. E. News Association* [1894] 1 Q. B. at p. 141; and Collins, M.R., in *Dakhyl* v. *Labouchere*, Times, July 29th, 1904 (C. A.; in the H. L. [1908] 2 K. B. 325 n.).

(*y*) Per Lopes, L.J., in *South Hetton Coal Co.* v. *N. E. News Association* [1894] 1 Q. B. at p. 141; *Homing Pigeon Publishing Co., Ld.* v. *Racing Pigeon Publishing Co., Ld.* [1913] 29 T. L. R. 389.

(*z*) Per Collins, M.R., in *McQuire* v. *Western Morning News* [1903] 2 K. B. at pp. 112, 113.

(*a*) Per Blackburn, J., in *Campbell* v. *Spottiswoode* [1863] 3 B. & S. 769. See also the observations of Lord Esher, M.R., and Bowen, L.J., in *Merivale* v. *Carson* [1887] 20 Q. B. D. 275; and Collins, M.R., in *Dakhyl* v. *Labouchere*, Times, 29th July, 1904 (in H. L. [1908] 2 K. B. 325 n.). And see *Hunt* v. *Star Newspaper Co.* [1908] 2 K. B. 309.

(*b*) Per cur. in *Reg* v. *Gray* [1900] 2 Q. B. at p. 40; and in *Arnold* v. *The King Emperor* [1914] 30 T. L. R. at p. 488 (P. C.); per Pickford, L.J., in *Neville* v. *Dominion of Canada News Co.* [1915] 3 K. B. at p. 566 (C. A.).

applicable whether the criticism be oral or written (*c*). The defence that the words complained of are fair comment on a matter of public interest is not confined to journalists, or any other class of persons, but is open to every defendant. "The liberty of the press is no greater and no less than the liberty of every subject" (*d*). The defence that the words complained of are fair comment on a matter of public interest really is, that the words, though they may be defamatory, are not actionable. "It is precisely where the criticism would otherwise be actionable as a libel that the defence of fair comment comes in" (*e*). If such comments were privileged, in order to succeed, plaintiff would have to prove malice, however unfair, injurious, and irrelevant to the matter commented on the words complained of may have been, while defendant would only have to prove that at the time he made the charges he believed that they were true, and this is certainly not the law (*f*).

"**Fair comment.**"—The limits of fair comment on matters of public interest are very wide. "Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with

(*c*) *Paris* v. *Levy* [1860] 30 L. J. C. P. 11.

(*d*) Per cur. in *Reg.* v. *Gray* [1900] 2 Q. B. at p. 40.

(*e*) Per Lord Loreburn, L.C., in *Dakhyl* v. *Labouchere* [1908] 2 K. B. at p. 327 (H. L.).

(*f*) See the observations of Blackburn, J., in *Campbell* v. *Spottiswoode* [1863] 32 L. J. Q. B. at p. 202.

ordinary judgment must say whether any fair man would have made such a comment. . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?" (*g*).

"The nearest approach . . . to an exact definition of the word 'fair' is contained in the judgment of Lord Tenterden, C.J., in *Macleod* v. *Wakley* (*h*), where he said, 'Whatever is fair and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel.' It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of

(*g*) Per Esher, M.R., in *Merivale* v. *Carson* [1887] 20 Q. B. D. at pp. 280, 281. See the observations of Fletcher Moulton, L.J., on this case in *Hunt* v. "*Star*" *Newspaper Co.* [1908] 2 K. B. at p. 318.

(*h*) [1828] 3 C. & P. at p. 313; cf. *Thomas* v. *Bradbury* [1906] 2 K. B. 627.

expression exceeds the reasonable limits of fair criticism. . . . The writer would be travelling out of the region of fair criticism . . . if he imputes to the author that he has written something which in fact he has not written" (*i*).

And the question whether the words are or are not fair comment is essentially for the jury. "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men or the proceedings in courts of justice or in Parliament, or the publication of a scheme or a literary work. But it is always left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not allowed to overstep these limits" (*k*).

Comment must be honest. "'Fair' embraces the meaning of honest and also of relevancy. The view expressed must be honest and must be such as can fairly be called criticism" (*l*).

(*i*) Per Bowen, L.J., in *Merivale* v. *Carson* [1887] 20 Q. B. D. at pp. 283, 284.

(*k*) Per Crompton, J., in *Campbell* v. *Spottiswoode* [1863] 3 B & S. at p. 778.

(*l*) Per Collins, M.R., in *McQuire* v. *Western Morning News* [1903] 2 K. B. at p. 110; Vaughan Williams, L.J., in *Joynt* v. *Cycle Trade Publishing Co.* [1904] 2 K. B. at p. 298. See also the observations of Lord Atkinson in *Dakhyl* v. *Labouchere* [1908] 2 K. B. at p. 329 (H. L.), and pp. 164—165 of the Author's "Principles and Practice of the Law of Libel and Slander," 5th ed., Butterworth & Co., London, 1917.

Criticism must not be made a cloak for malice, and it is therefore open to the plaintiff to show that the defendant has been actuated by malice (*m*). There should be no insinuation of improper and dishonourable conduct, unless the critic can prove that there are facts to warrant it (*l*); and it is no defence that defendant honestly believed the charges to be true (*n*).

The matter commented on must be actual fact. The very statement, indeed, of the rule set out on p. 145, *supra*, "assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails" (*o*). "A comment cannot be fair which is built upon facts which are not truly stated" (*p*). This reasoning does not, it seems, apply where a person other than the defendant has alleged the facts and the defendant has

(*m*) *Thomas* v. *Bradbury* [1906] 2 K. B. 627.

(*n*) Per Cockburn, C.J., in *Campbell* v. *Spottiswoode* [1863] 3 B. & S. 769; *Brenon* v. *Ridgway* [1887] 3 Times L. R. 592.

(*o*) Per cur. in *Lefroy* v. *Burnside* [1879] 4 L. R. Ir. at p. 565; see also *Davis & Sons* v. *Shepstone* [1886] 11 App. Cas. at p. 190, and *Joynt* v. *Cycle Trade Publishing Co.* [1904] 2 K. B. at p. 297.

(*p*) Per Kennedy, J., in *Joynt* v. *Cycle Trade Publishing Co.* [1904] 2 K. B. at p. 294.

simply commented on them (*q*). A newspaper may not set out evidence which might have been, but was not, in fact, given, and suggest as an inference therefrom that the prisoner, though acquitted, was really guilty (*r*). It may comment on evidence actually given (*s*), but may not charge a witness with having committed perjury (*t*). The defendant will not, however, be liable for trivial mistakes made accidentally, for "it is not to be expected that a public journalist will always be infallible" (*u*).

Matter of public interest.—Under this description come all State matters; everything which concerns Government, either House of Parliament, or any committee thereof (*x*): the public conduct of every one who takes part in public affairs (*y*), but not the private conduct of such persons, save in so far as it affects their public relations (*z*); legal (*a*) and ecclesiastical

(*q*) *Mangena* v. *Wright* [1909] 2 K. B. 958.
(*r*) *Rex* v. *White* [1808] 1 Camp. 359, n.
(*s*) *Hedley* v. *Barlow* [1865] 4 F. & F. 224.
(*t*) *Roberts* v. *Brown* [1834] 10 Bing. 519.
(*u*) Per Cockburn, C.J., in *Woodgate* v. *Ridout* [1865] 4 F. & F. 217.
(*x*) *Dunne* v. *Anderson* [1825] 2 Bing. 88; *Wason* v. *Walter* [1870] L. R. 4 Q. B. 73; *Henwood* v. *Harrison* [1872] L. R. 7 C. P. 606.
(*y*) Per Bramwell, B., in *Kelly* v. *Sherlock* [1866] L. R. 1 Q. B. at p. 689.
(*z*) *Wisdom* v. *Brown* [1885] 1 Times L. R. 412; *Pankhurst* v. *Hamilton* [1887] 3 Times L. R. 500.
(*a*) Per Cockburn, C.J., in *Cox* v. *Feeney* [1863] 4 F. & F. 13; and in *Purcell* v. *Sowler* [1877] 2 C. P. D. 218 (C.A.).

matters (*b*); the management of the poor and the administration of the poor law (*c*); places of public amusement or entertainment (*d*); literature (*e*), but not the private character of an author (*f*) or journalist (*g*); art (*h*); anything, in short, which invites public attention or criticism (*i*).

III. Privilege.

In certain cases, even though the words spoken or written be slanderous or libellous, in the interests of public policy the speaker or writer is not liable — in other words, the occasion is privileged—

On privileged occasions there is either:—

A. Absolute privilege — where the public interest, or the due administration of justice, renders the existence of **malice immaterial**; or

(*b*) *Kelly* v. *Tinling* [1865] L. R. 1 Q. B. 699.

(*c*) Per Cockburn, C.J., in *Purcell* v. *Sowler* [1877] 2 C. P. D. 215 (C. A.).

(*d*) *Dibdin* v. *Swan & Bostock* [1793] 1 Esp. 28; *Green* v. *Chapman* [1837] 4 Bing. N. C. 92; *McQuire* v. *Western Morning News* [1903] 2 K. B. 100; *Henwood* v. *Harrison*, *supra*.

(*e*) *Campbell* v. *Spottiswoode* [1863] 3 B. & S. 769; *Thomas* v. *Bradbury* [1906] 2 K. B. 627.

(*f*) *Fraser* v. *Berkeley* [1836] 7 C. & P. 621.

(*g*) *Russell and Another* v. *Webster* [1874] 23 W. R. 59.

(*h*) *Thompson* v. *Shackell* [1828] M. & M. 187.

(*i*) *Morrison* v. *Belcher* [1863] 3 F. & F. 614; *Duplany* v. *Davis* [1887] 3 Times L. R. 184; *Merivale* v. *Carson* [1887] 20 Q. B. D. 275 (C. A.); *Dakhyl* v. *Labouchere* [1908] 2 K. B. 325, n. (H. L.).

B. Qualified privilege—where on proof of malice plaintiff succeeds.

Upon occasions of qualified privilege no action lies unless the plaintiff prove malice in fact. The burden of proving this is on him, as was settled in *Clark* v. *Molyneux* (*k*). Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L.J., every wrong feeling in a man's mind (*l*).

It would greatly tend to accuracy of thought and clearness of expression in connection with this branch of the law if the word *malice* were only used in the above sense, *i.e.*, as denoting malice in fact.

It is unnecessary and leads to confusion to use it in the sense of malice in law, *i.e.*, the intention of doing an act which in fact is the breach of a general legal duty, whether the actor knows it or not.

Defining malice, then, as malice in fact, it is true to say that, in considering the defendant's *liability* in an action for libel or slander, malice

(*k*) [1872] 3 Q. B. D. 237; see also *Jenoure* v. *Delmege* [1891] A. C. 73. It is sufficient to prove that the defendant's agent was malicious, if he published the defamatory words in the course of his employment: *Fitzsimmons* v. *Duncan* [1908] 2 Ir. R. 483.

(*l*) Per Lindley, L.J., in *Stuart* v. *Bell* [1891] 2 Q. B. at p. 351.

is immaterial, except where a question of qualified privilege or fair comment or fair and *bonâ fide* report is raised (*m*).

A. The following are the cases of absolute privilege (*n*):

1. Parliamentary proceedings.
2. Judicial proceedings.
3. Naval, military, and State proceedings.

1. Parliamentary proceedings. No member is in any way responsible **for anything said in the House** (*o*); but this privilege does not extend to anything said outside the walls of the House, or to a speech printed and privately circulated **outside the House** (*p*).

At **common law** even if the whole House ordered the publication of parliamentary reports and papers, no privilege attached. This was laid down in the famous case of *Stockdale* v. *Hansard* (*q*), which was followed by the statute 3 & 4 Vict. c. 9. By this statute, all reports, &c.,

(*m*) On the other hand, the existence or non-existence of malice is often a material factor in considering what *damages* the plaintiff is entitled to.

(*n*) I am indebted to Mr. W. Blake Odgers, K.C., for this three-fold division, and also for that on pp. 160—161, *infra*. See pp. 230—249, of that learned Author's "Digest of the Law of Libel and Slander," 5th ed.

(*o*) Bill of Rights (1 Will. & M. st. 2, c. 2).

(*p*) *Rex v. Abingdon* [1794] 1 Esp. 226; *Rex* v. *Creevey* [1813] 1 M. & S. 273.

(*q*) [1837] 7 C. & P. 731.

published by order of either House of Parliament are absolutely privileged, and all proceedings, civil, or criminal, are to be stayed at once on production of a certificate to that effect. A newspaper which publishes extracts from State papers (*r*) or public registers (*s*) is absolutely privileged.

Reports of parliamentary proceedings, other than those protected by this statute, are **conditionally**, not **absolutely**, privileged (*t*).

2. Judicial proceedings. No action lies for defamatory statements made or sworn in the course of a judicial proceeding before any court of competent jurisdiction.

"The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger

(*r*) *Mangena* v. *Lloyd* [1908] 98 L. T. 640; *Mangena* v. *Wright* [1909] 2 K. B. 958.

(*s*) *Jones* v. *Financial Times* [1909] 25 T. L. R. 677 (C. A.); and see *Searles* v. *Scarlett* [1892] 2 Q. B. 56.

(*t*) See pp. 172—173, *infra*.

against the person defamed" (*u*). "The ground of that rule is public policy" (*x*). Thus, every statement made by either party or a witness to his solicitor or counsel (*y*) and all pleadings (*z*) and affidavits (*a*) are **absolutely privileged.** So too reports made by an Official Receiver in the course of his duty are absolutely privileged (*b*). Similarly every statement made by an advocate whilst acting in that capacity, whether counsel or solicitor (*c*), or the party in person (*d*), is **absolutely privileged,** no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been (*e*).

With regard to **witnesses, jurors** and **judges of inferior courts,** the rule laid down above requires qualification. Every statement made by a witness in the box is **absolutely privileged,** provided that it refers to the inquiry before the court, and this is so even if the statement in question is volunteered (*f*); but no privilege

(*u*) Per Lopes, L.J., in *Royal Aquarium, &c., Co.* v. *Parkinson* [1892] 1 Q. B. at p. 451.

(*x*) Per Lord Esher, M.R., *ibid.*, at p. 442.

(*y*) *Bank of British North America* v. *Strong* [1876] 1 App. Cas. 307; *Watson* v. *McEwan* [1905] A. C. 480; *Beresford* v. *White* [1914] 30 T. L. R. 591.

(*z*) *Lord Beauchamps* v. *Sir R. Croft* [1568] Dyer, 285 a.

(*a*) *Lilley* v. *Roney* [1892] 8 Times L. R. 642.

(*b*) *Bottomley* v. *Brougham* [1908] 1 K. B. 584; *Burr* v. *Smith* [1909] 2 K. B. 306.

(*c*) *Munster* v. *Lamb* [1883] 11 Q. B. D. 588.

(*d*) *Hodgson* v. *Scarlett* [1818] 1 B. & Ald. 244.

(*e*) *Munster* v. *Lamb* [1883] 11 Q. B. D. 588.

(*f*) *Seaman* v. *Netherclift* [1876] 2 C. P. D. 53.

would attach to the statements of a witness wholly unconnected with the matter in issue, and made entirely on his own account and to serve his own ends, or to statements made before entering or after leaving the box and unconnected with the preparation or conduct of the case (*g*). So, too, every observation of a **juror** is absolutely privileged if connected with the matter in issue (*h*).

As regards words spoken by a judge, the general rule laid down above is true only of the **judges of the superior courts** (*i*). Every statement made in office by a judge of a superior court is **absolutely privileged,** and under no circumstances will an action lie therefor (*k*). A similar privilege is extended to words spoken in office by the **judge of an inferior court of record,** provided that he has jurisdiction in the matter before him. If he knows, or ought to know, that he has no jurisdiction, he is in no way protected (*l*). No privilege attaches to words spoken

(*g*) *Trotman* v. *Dunn* [1815] 4 Camp. 211; *Watson* v. *McEwan* [1905] A. C. 480; *Beresford* v. *White* [1914] 30 T. L. R. 591.

(*h*) *Rex* v. *Skinner* [1772] Lofft, 55.

(*i*) For definition of superior court, see p. 19, *supra*.

(*k*) *Anderson* v. *Gorrie* [1895] 1 Q. B. 668.

(*l*) *Miller* v. *Seare and Others* [1777] 2 W. Bl. 1141; *Calder* v. *Halkett* [1839] 3 Moore P. C. 28; *Houlden* v. *Smith* [1850] 19 L. J. Q. B. 70; *Scott* v. *Stanfield* [1868] L. R. 3 Ex. 220. See also the observations of Lord Esher, M.R., in *Anderson* v. *Gorrie* [1895] 1 Q. B. at p. 671.

out of office (*m*). Everything said in office by a **justice of the peace** is also absolutely privileged, and no action lies therefor (*n*).

It is, however, important to notice that this privilege is confined to statements made in the course of strictly judicial proceedings, and is one which will not be extended. "It belongs to courts recognised by law, and to such courts only" (*o*). In *Barratt* v. *Kearns* (*p*) it was held that an inquiry held by an ecclesiastical commission appointed under the Pluralities Acts is a judicial inquiry, and that therefore a statement made by a witness at such inquiry was absolutely privileged. A meeting of the London County Council for granting music and dancing licences is not a court exercising judicial functions, and, therefore, defamatory statements made by a county councillor at such a meeting with regard to a person applying for a licence are not absolutely protected, but have only a qualified privilege, which may be rebutted by proof of express malice (*q*).

Similarly "proceedings before licensing justices, even though the justices are bound to

(*m*) *Paris* v. *Levy* [1861] 30 L. J. C. P. 12.

(*n*) *Law* v. *Llewelyn* [1906] 1 K. B. 487.

(*o*) Per Lopes, L.J., in *Royal Aquarium, &c., Co.* v. *Parkinson* [1892] 1 Q. B. at p. 451.

(*p*) [1905] 1 K. B. 504 (C. A.).

(*q*) *Royal Aquarium, &c., Co.* v. *Parkinson* [1892] 1 Q. B. 431; see also *Hodson* v. *Pare* [1899] 1 Q. B. 455.

show judicial discretion, are administrative and not judicial. In such cases the privilege is qualified and not absolute" (*r*), and consequently allegations in a notice of objection to the renewal of a licence are only protected by qualified privilege (*s*).

Reports of judicial proceedings are not absolutely, only conditionally, privileged (*t*). There is a possible exception to this in this case of such reports published in a newspaper, and which fall within the protection of sect. 3 of the Law of Libel Amendment Act, 1888. The point has not yet been decided in Court, but it has been held in Chambers that such reports are *absolutely* privileged (*u*).

3. Naval, military, and State proceedings. Everything done in the course of any naval or military proceeding is **absolutely privileged.** Volunteers when in training are under military law within this principle (*x*). Thus, any defamatory statement made before a naval or military court-martial, no matter how untrue and

(*r*) Per Darling, J., in *Mann, Crossman & Paulin, Ld.* v. *Pinhorn*, "Times," Newspaper, February 1, 1910.

(*s*) *Attwood* v. *Chapman* [1914] 30 T. L. R. 596.

(*t*) See pp. 170—172, *infra.*

(*u*) *Hope* v. *Leng*, March 19th, 1906. For the arguments in support of this contention, see the Author's "Principles and Practice of the Law of Libel and Slander," 5th ed. pp. 193—194, Butterworth & Co., London, 1917.

(*x*) *Marks* v. *Frogley* [1898] 1 Q. B. 888.

malicious, is protected (*y*). Similarly, no action lies in respect of such a statement in a report made in the course of military or naval duty (*z*). For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of State, *e.g.*, to every communication relating to State matters made by one minister to another or to the Crown (*a*).

B. The following are the cases of qualified privilege, in which proof of malice enables plaintiff to succeed:—

1. "When the circumstances are such as to cast on the defendant the **duty** of making the communication to a third party" (*b*).
2. "When the defendant has an **interest** in making the communication to the third person, and the third person has a corresponding interest in receiving it" (*c*).
3. Fair and impartial **reports** of proceedings (a) in Parliament; or (b) in any

(*y*) *Dawkins* v. *Lord Rokeby* [1875] L. R. 7 H. L. 744; Cockburn, C.J., dissentiente.

(*z*) *Dawkins* v. *Lord Paulet* [1869] L. R. 5 Q. B. 94.

(*a*) This passage, which appears in the Author's "Principles and Practice of the Law of Libel and Slander," 4th ed. p. 124, was cited with approval by Lord Esher, M.R., and Kay, L.J., in *Chatterton* v. *Secretary of State for India in Council* [1895] 2 Q. B. at pp. 191, 194.

(*b*) Per Lopes, L.J., in *Pullman* v. *Hill & Co.* [1891] 1 Q. B. at p. 530.

(*c*) Per Lopes, L.J., in *Pullman* v. *Hill & Co.* [1891] 1 Q. B. at p. 530.

court of justice; or (c) in any public meeting, or meeting of certain public bodies and persons specified in sect. 4 of the Law of Libel Amendment Act, 1888.

"The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion" (*d*). Further, it must be remembered, "as was pointed out by Lindley, L.J., in *Stuart* v. *Bell* (*e*), the question whether the occasion is privileged does not depend upon the defendant's belief that it is so" (*f*). Where privilege will protect the person who is the author it will protect the publisher also if under the circumstances it was reasonable for the author to employ someone else to publish, but it is the privilege of the author and consequently if privilege is rebutted by proving malice on the part of the author the publisher also loses the protection (*g*).

1. Duty.—(a) *Communications made in pur-*

(*d*) Per Lord Esher, M.R., in *Hebditch* v. *McIlwaine* [1894] 2 Q. B. at p. 58.

(*e*) [1891] 2 Q. B. 341.

(*f*) Per A. L. Smith, L.J., in *Hebditch* v. *McIlwaine* [1894] 2 Q. B. at p. 63.

(*g*) *Smith* v. *Streatfield* [1913] 3 K. B. 764.

suance of a duty owed to society.—"The rule is this, that where the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged" (*h*). "The duty may be legal, social, or moral" (*i*). "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits" (*k*). "Where," says Blackburn, J. (*l*), "a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he *bonâ fide* and without malice does tell them, it is a privileged communication."

In certain cases the communication complained of may be within the privilege, even though it has been made to the public. In *Adam* v. *Ward* (*m*), Buckley, L.J., said: "The

(*h*) Per Lopes, L.J., in *Pullman* v. *Hill & Co.* [1891] 1 Q. B. at p. 530.

(*i*) Per Lopes, L.J., in *Stuart* v. *Bell* [1891] 2 Q. B. at p. 353.

(*k*) Per Parke, B., in *Toogood* v. *Spyring* [1834] 1 C. M. & R. at p. 193, cited with approval by Buckley, L.J., in *Adam* v. *Ward* [1915] 31 T. L. R. at p. 303 (C. A.), Lord Buckmaster, L.C., in *London Association &c.* v. *Greenlands, Ld.* [1916] 2 A. C. at p. 22 (H. L.), and Lord Dunedin in *Adam* v. *Ward* [1917] A. C. at p. 328 (H. L.).

(*l*) *Davies* v. *Snead* [1870] L. R. 5 Q. B. 611.

(*m*) [1915] 31 T. L. R. at p. 299 (C. A.). The case went to the House of Lords (reported [1917] A. C. 309), who

following proposition, I think, is true . . . that if the matter is matter of public interest, and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as a matter of law, but, to quote Lord Justice Lindley's words in *Stuart* v. *Bell* (*n*), 'a duty recognized by English people of ordinary intelligence and moral principle but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.'" In that case the plaintiff, who was a Member of Parliament, in the course of a speech in the House of Commons, attacked an officer of the Army in his character as such, and the Army Council, having investigated the matter, found that the attack was wholly unjustifiable. Thereupon the defendant, who was at the time Permanent Under-Secretary for War, published, under the instructions of his superiors in the War Office, an official communiqué, including a letter to the officer who had been attacked by the plaintiff. This letter the plaintiff alleged to mean that he (the plaintiff) had been guilty of dishonourable conduct, and had in consequence thereof been removed from his regiment. In these circumstances it was

unanimously upheld the judgment of the Court of Appeal. Lord Dunedin stated (*ibid.*, p. 322) that the reasons given for that judgment by Lord Wrenbury, then Buckley, L.J., were entirely satisfactory to his mind.

(*n*) [1891] 2 Q. B. at p. 350 (C. A.).

unanimously held by the House of Lords and the Court of Appeal, reversing a verdict and judgment for the plaintiff for £2,000 damages, that the letter was published on a privileged occasion.

"The belief of the defendant that there was a duty to make the communication is irrelevant to the question whether the occasion is privileged" (*o*).

Even if volunteered, the communication may fall within the protection of the general rule laid down above; for "it is not necessary in all cases that the information should be given in answer to an inquiry" (*p*), though under such circumstances it will, of course, be more difficult for the defendant to satisfy a jury that in making the communication he was not actuated by malice (*q*).

Under this head of privilege come communications as to the characters of clerks and servants. No one is obliged to give his clerk or servant a character (*r*); but if he does so he must do it honestly, and then, even if it be in fact untrue, the master will be protected (*s*). If a master after giving a servant a character discovers facts

(*o*) Per Lord Esher, M.R., in *Hebditch* v. *McIlwaine* [1894] 2 Q. B. at p. 103.

(*p*) Per Jessel, M.R., in *Waller* v. *Loch* [1881] 7 Q. B. D. at p. 621.

(*q*) Per Littledale, J., in *Pattison* v. *Jones* [1828] 8 B. & C. at p. 586.

(*r*) *Carrol* v. *Bird* [1800] 3 Esp. 201.

(*s*) *Rogers* v. *Clifton* [1803] 3 B. & P. 587; *Murdoch* v. *Funduklian* [1886] 2 Times L. R. 614.

unfavourable to him, and communicates these to the person to whom he had previously given such character, such communication is privileged (*t*); and if a master discharges one of his servants and tells the others why he has done so, such communication will also be privileged (*u*). Thus, where the plaintiff was a guard in the service of the defendants, a railway company, and the defendants dismissed him on the ground that he had been guilty of gross neglect of duty and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed, and the ground of his dismissal, it was held that such circular was privileged if published *bonâ fide* and without malice towards the plaintiff (*x*).

A similar protection is extended to all communications, made *bonâ fide* and on reasonable grounds, to a father respecting his child (*y*), or to a master as to his servant (*z*); by one friend to another as to a doctor (*a*), or tradesman (*b*), or an intending suitor (*c*); by a servant to his

(*t*) *Gardner* v. *Slade* [1849] 18 L. J. Q. B. 334.
(*u*) *Somerville* v. *Hawkins* [1850] 10 C. B. 590.
(*x*) *Hunt* v. *G. N. Ry. Co.* [1891] 1 Q. B. 189.
(*y*) Per Erle, C.J., in *Whiteley* v. *Adams* (1863) 33 L. J. C. P. p. 95.
(*z*) *Masters* v. *Burgess* [1887] 3 Times L. R. 96.
(*a*) *Dixon* v. *Smith* [1860] 29 L. J. Ex. 125.
(*b*) *Storey* v. *Challands* [1837] 8 C. & P. 234.
(*c*) 15 C. B. N. S. 410, 411.

master (*d*); by an undermaster to the headmaster (*e*); by an official in the army or navy or any government office to his superior (*f*); by a master concerning his servant or a child entrusted to his charge, to the parent or guardian of such servant or child (*g*); and by a solicitor to his client (*h*), even though he is not at the time engaged in the conduct of any legal proceedings on his behalf (*i*).

"If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" (*k*). Therefore where in the ordinary course of business of a company or mercantile firm (*l*) it is reasonably necessary that a document should be copied into a copy letter-book or telegram-book, the privilege is not lost.

On the same ground, "if a communication made by a solicitor to a third party (*e.g.*, his clerk) is reasonably necessary and usual in the dis-

(*d*) *Scarl* v. *Dixon* [1864] 4 F. & F. 250.
(*e*) *Hume* v. *Marshall* [1878] 42 J. P. 136.
(*f*) *Stace* v. *Griffith* [1869] L. R. 2 P. C. 420.
(*g*) *Fowler* v. *Homer* [1812] 3 Camp. 294.
(*h*) *Wright* v. *Woodgate* [1835] 2 C. M. & R. 573.
(*i*) *Davis* v. *Reeves* [1855] 5 Ir. R. C. L. 79.
(*k*) Per Moulton, L.J., in *Edmondson* v. *Birch* [1907] 1 K. B. at p. 382.
(*l*) *Edmondson* v. *Birch* [1907] 1 K. B. 371 (C. A.); and see particularly the observations of Cozens-Hardy, L.J., at p. 382.

charge of his duty to his client and in the interest of his client, the occasion is privileged" (*m*).

The fact that there were other persons present than those to whom the defendant was under a duty to make the statement in question will not necessarily destroy the privilege. If their presence was accidental or could not be prevented by the defendant, the privilege will not be lost. Thus, in *Pittard* v. *Oliver* (*n*), it was held that the privilege which would have attached to defamatory statements made at a meeting of a board of guardians, of which the defendant was a member, was not destroyed by the presence of reporters. "Was the defendant's duty to the guardians and to the ratepayers generally taken away by the presence of these other persons who were not called in by him, and over whose presence he could exercise no control? The question answers itself; the presence of these persons left his duty to discuss the matters untouched; the occasion was privileged for the performance of that duty, and the privilege was not taken away by the presence of such people under such circumstances" (*o*).

(b) *Communications made in self-defence.*— Thus, if the plaintiff had previously attacked the

(*m*) Per Lopes, L.J., in *Boxsius* v. *Goblet Frères* (1894) 1 Q. B. at p. 846.

(*n*) [1891] 1 Q. B. 474; *Mapey* v. *Baker* [1909] 73 J. P. 289.

(*o*) Per Lord Esher, M.R., in *Pittard* v. *Oliver* [1891] 1 Q. B. at p. 478.

defendant, any statement made by the latter which is necessary in order to protect himself, and which is in any way relevant to the accusations made against him by the plaintiff, is privileged; *e.g.*, where the policy-holder of an insurance company published a pamphlet charging the directors with fraud, and the directors published a pamphlet in reply defending themselves and accusing the plaintiff of making false and calumnious accusations, and further stating that he had upon certain occasions made statements on oath in direct contradiction of statements which he had previously made in writing, it was left to the jury to say whether the countercharges made by the defendants were made *bonâ fide*, and whether they went beyond the occasion, and the jury found for the defendants (*p*). So, too, where the plaintiff has previously attacked the defendant in the newspapers (*q*), or in public (*r*), and the latter retaliates by publishing in the papers in self-defence a statement of the case from his point of view, and in so doing makes defamatory statements concerning the plaintiff, such statement is privileged if made *bonâ fide*.

There will, however, be no privilege if the

(*p*) *Koenig* v. *Ritchie* [1862] 3 F. & F. 413; *Reg.* v. *Veley* [1865] 4 F. & F. 1117.

(*q*) *Coward* v. *Wellington* [1836] 7 C. & P. 531.

(*r*) *Laughton* v. *Bishop of Sodor and Man* [1872] L. R. 4 P. C. 495.

statement is too widely published, *e.g.*, if the defendant has been attacked by the plaintiff in an obscure local journal and retaliates in a leading London paper.

2. Interest.

"If the communication was of such a nature that it could be fairly said that those who made it had an **interest** in making such a communication, and those to whom it was made had a corresponding interest in having it made to them,—when those two things co-exist, the occasion is a privileged one" (*s*). **This common interest may be in respect of family affairs**—*e.g.*, communications made *bonâ fide* to a lady by her son-in-law, as to the character of her intended husband (*t*), **or it may be in respect of money matters**—*e.g.*, a letter written by a ratepayer affecting the character of the parish constable, to be read at a parish meeting at which the accounts of the parish were to be considered (*u*), **or in respect of a particular profession or calling**—*e.g.*, anything said by a life governor of a school to its steward concerning one of the tradesmen employed to supply the school (*x*), **or in respect of any right or duty recognised by the law**—*e.g.*, a letter written by a creditor who had

(*s*) Per Lord Esher, M.R., in *Hunt* v. *G. N. Ry. Co.* [1891] 2 Q. B. at p. 191.

(*t*) *Todd* v. *Hawkins* [1837] 8 C. & P. 88.

(*u*) *Spencer* v. *Amerton* [1835] 1 Moo. & R. 470.

(*x*) *Humphreys* v. *Stilwell* [1862] 2 F. & F. 590.

been appointed trustee in liquidation of a debtor's estate to another creditor (*y*), or by a solicitor writing on behalf of his client, and in the ordinary course of his duty, to a third party (*z*).

But in all these cases the privilege will be lost if the statement is made to an unnecessarily large number of persons (*a*), or extends to matters outside those in which the plaintiff and defendant have a common interest (*b*).

3. Fair reports of proceedings (A) in Courts of Justice; (B) in Parliament; (C) in public meetings.

(A) Reports of proceedings in Courts of Justice, in order to be privileged, must be—

a. *Fair and accurate:*

The report must be "substantially a fair account of what took place" (*c*) in court.

It is immaterial by whom it was published. In the words of Brett, L.J.,

(*y*) *Spill* v. *Maule* [1869] L. R. 4 Ex. 232.

(*z*) *Quartz Hill Gold Mining Co.* v. *Beall* [1882] 20 Ch. D. 509; *Baker* v. *Carrick* [1894] 1 Q. B. 838.

(*a*) *Duncombe* v. *Daniell* [1837] 8 C. & P. 222.

(*b*) *Adam* v. *Ward* [1917] A. C. 309 (H. L.).

(*c*) Per Lord Campbell, C.J., in *Andrews* v. *Chapman* [1853] 3 C. & K. at p. 289; cf. *Furniss* v. *Cambridge Daily News* [1907] 23 T. L. R. 705 (C. A.); *Hope* v. *Leng* [1907] 23 T. L. R. 243 (C. A.). The omission of the result may be most material: *Pope* v. *Outram* [1909] S. C. 230.

the privilege is the same "for a private individual as for a public newspaper" (*d*). "There is no special privilege for newspapers" (*e*). A report of the judgment alone, without any report of the evidence, is privileged (*f*).

Formerly, reports of *ex parte* proceedings were not privileged. *Currie* v. *Walter* (*g*) and *Lewis* v. *Levy* (*h*) decided that such reports are privileged if the *ex parte* proceedings result in the discharge by the magistrates of the party charged; it must now, however, be considered settled by *Usill* v. *Hales* (*i*) and *Kimber* v. *The Press Association* (*k*) that **all reports of ex parte proceedings are privileged.** In the former case an action was brought against the proprietors of the *Daily News*, the *Standard*, and the *Morning Advertiser* for publishing a report of an *ex parte* application by three engineers to a

(*d*) *Milissich* v. *Lloyds* [1877] 46 L. J. C. P. 404.
(*e*) Per Day, J., in *Rumney* v. *Walter* [1892] 8 Times L. R. at p. 262.
(*f*) Per Fry, L.J., in *Macdougall* v. *Knight* [1890] 25 Q. B. D. at p. 11; but see the observations of Lord Halsbury, L.C., in *Macdougall* v. *Knight* [1889] 14 A. C. at pp. 200—203.
(*g*) [1796] 1 B. & P. 525.
(*h*) (1858) 27 L. J. Q. B. 287.
(*i*) [1878] 3 C. P. D. 319.
(*k*) [1893] 1 Q. B. 65 (C. A.).

magistrate for criminal process against the plaintiff, stating that the plaintiff had employed, but not fully paid, them. It was held that such report of *ex parte* proceedings was privileged, as being fair and accurate.

b. *Not prohibited by order of the court.*

c. *Not blasphemous, seditious, nor immoral:*

Even if the report satisfies the above conditions, yet it will **not** be **privileged** if plaintiff proves that defendant was actuated by **malice** (*l*).

Where judicial proceedings last more than one day, and publication is not expressly forbidden by the court, a report published daily is privileged, if fair and accurate, *but* no comment is allowed until the proceedings terminate (*m*).

(B) Reports of Parliamentary proceedings. Every fair and accurate report of any proceeding in either House of Parliament, or in any committee thereof, is privileged. The analogy between such reports and those of legal proceedings

(*l*) *Stevens* v. *Sampson* [1879] 5 Ex. D. 53. As to a possible exception to this rule, see p. 159, *supra*.

(*m*) *Lewis* v. *Levy* [1858] 27 L. J. Q. B. 287; *Rex* v. *Davies* [1906] 1 K. B. 32.

is complete. Whatever would deprive a report of a trial of immunity will equally deprive a report of parliamentary proceedings of all privilege.

The above rule was for a long time doubtful; it is now clearly and satisfactorily settled by *Wason* v. *Walter* (*n*), in which case the plaintiff sued the proprietor of the *Times* for publishing a report of a debate in the House of Lords commenting severely on plaintiff's conduct in procuring the presentation of a petition to the House of Lords, which charged a high judicial officer with misconduct; and it was held that the report was privileged.

As has been pointed out, the privilege attaching to fair and accurate reports may be rebutted by proof of actual malice. In these cases there are two distinct questions for the jury—

1. Is the report fair and accurate? If so, it is *primâ facie* privileged; if not, verdict for plaintiff. If this question is answered in the affirmative,
2. Was the report, though fair and accurate, published maliciously?

(*n*) [1868] 4 Q. B. D. 73.

(C) By the Law of Libel Amendment Act, 1888, s. 4, a fair and accurate report in a newspaper of the proceedings of a public meeting, or of any meeting of a vestry, town council, school board, or other public bodies or persons specified in such Act, is privileged,

provided that—

(1) Such report is fair and accurate;

(2) The matter complained of is not blasphemous or indecent; and

(3) The matter complained of is of public concern, or the publication thereof is for the public benefit. This privilege may be rebutted by proof (1) that the report was published or made maliciously; or (2) that the defendant has, after request, refused or neglected to insert in his newspaper a reasonable letter or statement by way of contradiction or explanation of such report (*o*).

Unless therefore, a report is—

(a) Of proceedings in a court of justice; or

(b) Of parliamentary proceedings; or

(c) Within the protection of sect. 4 of the Law of Libel Amendment Act, 1888,

it is no defence to plead that the report is a

(*o*) For further information on this subject, see the Author's "Principles and Practice of the Law of Libel and Slander," 5th ed. pp. 210—222, Butterworth & Co., London, 1917.

correct and faithful report of what actually took place. The defendant must rely on—

(1) The matter published being strictly true, and (if defendant in a criminal case) for the public benefit; or

(2) The words used being a fair comment on a matter of public interest.

IV. Apology.

This statutory defence is only available in an action for a libel contained in a *public newspaper or other periodical publication* (*p*); and the defendant must prove (1) that the libel was published without actual malice and without gross negligence; and (2) that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or publication a full apology for such libel.

Moreover, there must be a payment of money into court by way of amends at the time the plea is filed (*p*), and therefore, having regard to Ord. XXII., Rule 1, no other defence denying liability can be pleaded together with such plea.

Injunctions.—The Court has jurisdiction in an action of libel or slander to restrain by injunction either before or at the trial any further

(*p*) 6 & 7 Vict. c. 96 (Lord Campbell's Libel Act), ss. 1, 2, as amended by 8 & 9 Vict. c. 75.

publication of such libel or slander (*q*), but in the former case the jurisdiction will be exercised with great caution (*r*).

In order to obtain an interim injunction the plaintiff must make his application promptly (*s*); he must also prove that the defendant intends to continue the publication complained of (*t*), and further, that unless at once restrained such statements will cause immediate (*u*) and irreparable (*x*) injury to person or property.

There have been several important cases on this branch of the law, and "in a judgment of Lord Esher, M.R., which underlies every subsequent decision on the subject" (*y*), the rule of practice is thus stated: "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel before the jury decides whether it is a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases where any jury would say that the matter complained of is libellous, and where, if the jury did

(*q*) *Saxby* v. *Easterbrook* [1878] 3 C. P. D. 339.

(*r*) *Quartz Hill Gold Mining Co.* v. *Beall* [1882] 20 Ch. D. 501.

(*s*) *Monson* v. *Tussauds, Limited* [1894] 1 Q. B. 671.

(*t*) Per Jessel, M.R., in *Quartz Hill Gold Mining Co.* v. *Beall* [1882] 20 Ch. D. at pp. 508, 509.

(*u*) *Salomons* v. *Knight* [1891] 2 Ch. 294.

(*x*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1885] 15 Q. B. D. 467.

(*y*) Per Lopes, L.J., in *Monson* v. *Tussauds, Limited* [1894] 1 Q. B. at p. 693.

not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It follows from those three rules that the court can only on the rarest occasions exercise the jurisdiction" (*z*). Thus, in *Collard* v. *Marshall* (*a*) an interlocutory injunction was granted to restrain the defendant, who was the secretary of a trade union, from publishing a placard stating that there was a strike now on at the plaintiff's works; that the sweating system was practised, and the polishing badly done there —these statements being held to be untrue, and the defendant not suggesting that he could produce further evidence in support of them.

The Court has also a general jurisdiction to restrain by injunction the publication of any matter which tends to prejudice the administration of justice, provided that application for such relief is made without delay. Thus the publication of any comments on a pending trial will be restrained if the court considers they are

(*z*) Per Lord Esher, M.R., in *Coulson* v. *Coulson* [1887] 3 Times L. R. at p. 846; approved and in part adopted by the full Court of Appeal in *Bonnard* v. *Perryman* [1891] 2 Ch. at p. 284; and, again, per Lopes, L.J., and Davey, L.J., in *Monson* v. *Tussauds, Limited* [1894] 1 Q. B. at pp. 693, 696, 697.

(*a*) [1892] 8 Times L. R. 846; cf. *Corelli* v. *Wall* [1906] 22 T. L. R. 532.

likely to prejudice the course of justice, and whether such comments amount to a libel (*b*) or not (*c*).

Slander of title and Slander of goods.—Strictly speaking, these wrongs have no place in a chapter on libel and slander, but for the sake of convenience it seems desirable to deal shortly with the subject. Slander of title consists of a false, malicious statement of fact in writing, printing, or by word of mouth injurious to any person's title to property, and causing special damage to such person. For the publication of such statement an action will lie. In such a case there is no wrong to the reputation—no defamation—and the action is not for libel or slander, but "an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title" (*d*). In order to succeed the plaintiff must prove:—

(1) That the statement is false;
(2) That it is malicious in fact;

(*b*) *Coleman* v. *West Hartlepool Harbour, &c., Co.* [1860] 8 W. R. 734.

(*c*) *Mackett* v. *Commissioners of Herne Bay* [1876] 24 W. R. 845.

(*d*) *Per* Tindal, C.J., in *Malachy* v. *Soper* [1835] 3 Bing. N. C. 371. Per Lord Davey in *Royal Baking Powder Co.* v. *Wright* [1900] 18 Rep. Patent Cases at p. 99; see also *Barrett* v. *Associated Newspapers* [1907] 23 T. L. R. 666.

(3) That it has caused him special damage (*e*).

Slander of goods.—It is also actionable to publish maliciously, or without lawful occasion, a false statement disparaging the goods of any person, and causing such person special damage (*f*). The malice spoken of above is want of good faith, or any corrupt or wrong motive.

There is a great difference between puffing one's own goods and disparaging those of another trader. A mere puff which praises one's own goods confers no right of action on a rival trader, but if one goes further and decries his goods or property and causes him damage, then an action lies. Thus to say one's goods are equal to or better than those of another gives no cause of action (*g*). An untrue statement by a newspaper as to its circulation may amount to a statement disparaging a rival (*h*).

(*e*) *Lyne* v. *Nichols* [1906] 23 T. L. R. 86. The obligation to prove special damage is not got rid of by the mere device of framing the action as a claim for defamation : *Griffiths* v. *Benn* [1911] 27 T. L. R. 346.

(*f*) *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* [1874] L. R. 9 Ex. 218, 222; *Ratcliffe* v. *Evans* [1892] 2 Q. B. at p. 524; *White* v. *Mellin* [1895] A. C. 154; *Hubbuck* v. *Wilkinson* [1899] 1 Q. B. 86; *Leethem* v. *Rank* [1912] 57 S. J. 111.

(*g*) *Hubbuck* v. *Wilkinson* [1899] 1 Q. B. 86; cf. *Alcott* v. *Millar's Karri, &c., Co.* [1904] 22 T. L. R. 30.

(*h*) *Lyne* v. *Nichols* [1906] 23 T. L. R. 86; *Concaris* v. *Duncan* [1909] W. N. 51.

CHAPTER VIII.

OF WRONGS TO THE PERSON.

A.—Assault and Battery.
B.—False Imprisonment.
C.—Malicious Prosecution.
D.—Malicious Arrest.

A.—An assault is the unlawful laying of hands on another person, or an attempt or offer to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act. No mere words can in any case amount to an assault (*a*).

A battery is the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner. "The least touching of another in anger is a battery" (*b*).

"Such acts as are reasonably necessary for the common intercourse of life are not assaults or

(*a*) Stephen's Digest of the Criminal Law, 6th ed. p. 202.
(*b*) Per Holt, C.J., in *Coles* v. *Turner* [1705] 6 Mod. 149.

batteries, if they are done for the purpose of such intercourse only, and with no greater force than the occasion requires" (*c*).

Mayhem is assault and battery of such an aggravated character as to amount to an actual wounding of the person; or, according to an old definition, "The violently depriving another of the use of such of his members as may render him the less able in fighting to defend himself or to annoy his adversary."

Assault and battery are justifiable—

(1) **In defence of person or property** (*d*). The force used must not, however, be more than is necessary under the circumstances. Under the first of these heads a man may justify himself on the ground of defending his wife, child, or probably even his friend.

(2) **By reason of defendant's peculiar position,** *e.g.*, a father may chastise his child, or a schoolmaster his boys, or a captain the sailors on board his ship; but the chastisement must not be excessive or unreasonable.

(3) **By leave and licence** of the party injured.

(*c*) Stephen's Dig. Cr. Law, 6th ed. p. 203.

(*d*) See *Blades* v. *Higgs* [1861] 30 L. J. C. P. 347; *Hemming* v. *Stoke Poges* [1920] 1 K. B. 720; and pp. 57, 62, *supra*. But a person who has paid for a seat cannot be ejected unless he gives special cause for so doing: *Hurst* v *Picture Theatres* [1915] 1 K. B. 1.

(4) In the preservation of the public peace, if committed during the continuance of the affray (*e*), and with no more force than is necessary.

(5) For service of legal process (*f*), including searching when authorized by law (*g*).

Defence under the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 42—45.—Where an assault is complained of before justices, and (1) the punishment imposed by the justices is suffered, or (2) after an actual hearing on the merits (*h*), they give a certificate of acquittal on the ground (a) that the offence is deemed not proved, or (b) that it was "justified, or so trifling as not to merit any punishment," then in the above cases there is immunity from "all further or other proceedings against defendant, civil or criminal, for the same cause." In *Reg.* v. *Morris* (*i*) it was held that these words mean subsequent proceedings for an assault, and that they are not meant to cover subsequent proceedings for the act constituting the assault. Thus, in the case cited, it was held that if death followed an assault, for which the offender had been punished, he might, nevertheless, be indicted for manslaughter; and in the later case of

(*e*) *Noden* v. *Johnson* [1850] 16 Q. B. 218.
(*f*) *Rose* v. *Kempthorne* [1911] 103 L. T. 730.
(*g*) *Taylor* v. *Pritchard* [1910] 2 K. B. 320.
(*h*) *Reed* v. *Nutt* [1890] 24 Q. B. D. 669.
(*i*) [1867] L. R. 1 C. C. R. 90.

Masper v. *Brown* (*k*) it was held that a man who had been fined for an assault on a married woman could not be subsequently sued by her husband for the damage he had sustained by the loss of his wife's services. In *Dyer* v. *Munday* (*l*) it was held that a master was not released from liability for his servant's assault by reason of the fact that the servant had been convicted and suffered the punishment.

The granting of the certificate by the justices may, if it be refused, be compelled by mandamus.

B. — False imprisonment is some unlawful detention of the person, either (1) actual, *e.g.*, laying hands upon a person; or (2) constructive, *e.g.*, by an officer telling anyone he is wanted and making him accompany him, as was done by a bailiff in *Grainger* v. *Hill* (*m*). There must be **restraint** or **show of authority,** but not necessarily incarceration. But the restraint must be total. A mere partial restraint is not sufficient. Thus, in *Bird* v. *Jones* (*n*) it was held that no imprisonment was committed by two policemen who merely hindered defendant from going on a portion of a public footway on a bridge which was appropriated for seats to view a regatta. Again, a man who agrees to go to a place which he cannot leave unless his employer does something

(*k*) [1876] 1 C. P. D. 97.
(*l*) [1895] 1 Q. B. 472.
(*m*) [1838] 4 Bing. N. C. 212.
(*n*) [1845] 7 Q. B. 742.

(*e.g.*, a miner who works in a coal mine) cannot, if he desires to leave in breach of his contract, require his employer to take active steps to enable him to leave until the time agreed upon (*o*). The plaintiff need only prove the detention or imprisonment; the defendant must then justify what he did, which he can do—

I. If he acted under legal warrant.

II. If he acted without warrant:—

1. If a constable (*p*) he may arrest—

(1) Anyone whom he suspects on reasonable grounds (*q*) of having committed a felony (*r*).

(2) To prevent a breach of the peace, or whenever a breach had been committed in his presence.

(3) By statutory authority, *e.g.*, when he finds anyone committing an indictable offence by night or malicious injury to property (*s*).

(*o*) *Herd* v. *Weardale Steel, &c., Co.* [1915] A. C. 67.

(*p*) It would seem that a constable employed by a railway company under statutory powers can only arrest, off the company's premises, in respect of an offence committed on those premises; *King* v. *Metropolitan Dist. Ry. Co.* [1908] 99 L. T. 278.

(*q*) *Green* v. *Garbutt* [1912] 28 T. L. R. 575.

(*r*) Archbold's Criminal Pleading and Evidence, 25th ed., pp. 961, 962; and see *Lambert* v. *G. E. Ry. Co* [1909] 2 K. B. 776; *Walters* v. *Smith* [1914] 1 K. B. at p. 602.

(*s*) For an example, see *Trebeck* v. *Crondace* [1918] 1 K. B. 158.

2. If a private person, he may arrest—

(1) Anyone whom he suspects on reasonable grounds of having committed a felony, **provided that a felony has actually been committed** (*t*).

(2) To stay a breach of the peace or for treason.

(3) By statutory authority, *e.g.*, under the Vagrancy Act (5 Geo. 4, c. 83), for indecent exposure, street gaming, &c.

(4) Anyone for whom he has become bail in order to give him up in his (the bailor's) discharge (*u*).

3. By reason of his position, *e.g.*, naval and military officers may detain their subordinates, a master his apprentice, or a father his child.

A person who allows passengers on to his premises does not bind himself to provide a free exit, and consequently can lawfully decline to allow anyone, who does not pay his charge, to leave them (*v*).

C.—Malicious prosecution is a malicious institution against another of criminal or bankruptcy proceedings without reasonable and probable cause. Plaintiff must prove four things—

(*t*) *Walters* v. *Smith* [1914] 1 K. B. 595.
(*u*) *Ex parte Lyne* [1822] 3 Stark. 132.
(*v*) *Robinson* v. *Balmain New Ferry Co.* [1910] A. C. 295.

1. **That defendant preferred a charge of the nature indicated (in above definition) against him before a judicial officer.**

There must be the active preferring of a charge; therefore merely signing a charge sheet is not enough (*x*). The charge need not necessarily be one which is punishable by imprisonment in the first instance (*y*).

2. **That defendant acted maliciously.** The malice here spoken of is "malice in fact (*malus animus*), indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody" (*z*). As was pointed out by Bowen, L.J., in *Abrath* v. *N. E. Rail. Co.* (*a*), the plaintiff in an action of this kind must prove that the defendant acted "from an indirect and improper motive, and not in furtherance of justice." In the words of Alderson, B. (*b*), "any motive other than that of simply instituting a prosecution for the

(*x*) *Sewell* v. *N. T. Co.* [1907] 1 K. B. 557.

(*y*) *Wiffen* v. *Bailey* [1914] 2 K. B. 85. The cases on slander do not apply, see *ante*, p. 140.

(*z*) Per Hawkins, J., in *Hicks* v. *Faulkner* [1882] 8 Q. B. D. at p. 175.

(*a*) [1883] 11 App. Cas. at p. 247.

(*b*) *Stevens* v. *Midland Counties Ry. Co.* [1854] 10 Ex. 356.

purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way." The existence of malice is purely a question of fact for the jury. Absence of reasonable and probable cause is not of itself sufficient evidence of malice (*c*); nor is the mere fact that the plaintiff was acquitted (*d*).

3. **That the defendant acted without reasonable and probable cause.** The jury find the facts on which the question of reasonable and probable cause depends, and the judge then decides whether the facts so found constitute reasonable and probable cause (*e*).

4. **That the proceedings terminated in plaintiff's favour;** but this need not be proved if the proceedings are in their nature incapable of terminating in the plaintiff's favour, *e.g.*, the malicious exhibition of articles of the peace (*f*).

It has been held that an action for malicious prosecution will lie against a corporation or limited company (*g*).

(*c*) *Browne* v. *Hawkes* [1891] 2 Q. B. 718; see particularly the observations of Bowen, L.J., at pp. 727—728; *Bradshaw* v. *Waterlow* [1915] 3 K. B. 527.

(*d*) *Corea* v. *Peiris* [1909] A. C. 549.

(*e*) *Perryman* v. *Lister* [1868] L. R. 4 H. L. 521; *Cox* v. *English Bank* [1905] A. C. 168.

(*f*) *Steward* v. *Gromett* [1859] 7 C. B. N. S. 191.

(*g*) *Edwards* v. *Midland Ry. Co.* [1880] 6 Q. B. D. 287;

Distinction between false imprisonment and malicious prosecution.

A person who sets the criminal law in motion without making its act his own may be liable for malicious prosecution, but he cannot be sued for false imprisonment.

The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a **ministerial** officer in motion, but a **judicial** officer. "The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (*h*). Thus the question is, does defendant set a **ministerial** or a **judicial** officer in motion; if the former, he may be liable for false imprisonment; if the latter, for malicious prosecution.

In an action for false imprisonment the onus of proving reasonable and probable cause lies on

Kent v. *Courage* [1891] 55 J. P. 264; *Cornford* v. *Carlton Bank* [1899] 1 Q. B. 392; *Rayson* v. *South London Tramways Co.* [1893] 2 Q. B. 304; *Citizens' Life Assurance Co.* v. *Brown* [1904] A. C. 423.

(*h*) Per Willes, J., in *Austin* v. *Dowling* [1870] L. R. 5 C. P. at p. 540; cf. *Everett* v. *Griffiths* [1920] 3 K. B. 163.

the defendant; in an action for malicious prosecution the onus lies upon the plaintiff to prove that the defendant acted without reasonable and probable cause. The reason for this distinction is that any interference with a man's personal liberty is *primâ facie* wrongful, and therefore has to be justified; but anyone is *primâ facie* entitled to set the criminal law in motion (*i*). "Imprisonment is *primâ facie* a tort; prosecution is not so in itself" (*k*).

D.—Malicious arrest is wilfully putting the law in motion to effect the arrest under civil process of another without cause, and anyone committing this offence, *i.e.*, deliberately obtaining the arrest of another by a false statement or suppression, renders himself liable to an action for damages. The malice here spoken of is malice in law (*l*).

(*i*) "Cases illustrating the Principles of the Law of Torts," by Radcliffe and Miles, Clarendon Press, 1904.

(*k*) Per Alderson, B., in *Panton* v. *Williams* [1841] 2 Q. B. at p. 181. See also the observations of Hawkins, J., in *Hicks* v. *Faulkner* [1882] 8 Q. B. D. at p. 170.

(*l*) For definition of malice in law, see p. 153, *supra*.

CHAPTER IX.

OF WRONGS ARISING FROM FRAUD (*a*).

Fraud is a false representation of fact made with a knowledge of its falsehood, or without belief in its truth, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party. No action lies unless the plaintiff has been induced to act upon such false representation and actual damage has resulted — such damage being the actual and probable consequence of plaintiff's action on faith of defendant's statement.

The leading case on this subject is *Derry* v. *Peek* (*b*), which came before the House of Lords in 1889. "*Derry* v. *Peek*," said Bowen, L.J. (*c*),

(*a*) I am under considerable obligation to the late Sir William Anson's Law of Contract in respect of the first part of this chapter, and the student should carefully read pp. 202–218 of the 14th edition of that learned author's work.

(*b*) 14 App. Cas. at p. 374; and see *Pearson* v. *Dublin Corporation* [1907] A. C. 351.

(*c*) In *Le Lièvre* v. *Gould* [1893] 1 Q. B. at p. 499; see also *Refuge Assce. Co.* v. *Kettlewell* [1908] 1 K. B. 545; [1909] A C. 243; *Assicurazioni, &c. de Trieste* v. *Empress, &c. Assn.* [1907] 2 K. B. 814.

"decided . . . that you cannot succeed in an action of fraud without proving that the defendant was fraudulent. It is singular that any doubt should ever have been cast on that proposition" (*d*). In his judgment in the House of Lords Lord Herschell thus summarized the law. "I think," said the learned judge, "the authorities establish the following propositions:— First in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which

(*d*) This general principle is, however, now subject to the statutory exception introduced by the Directors' Liability Act, 1890, in the year following that in which *Derry* v. *Peek* came before the House of Lords. The material provisions of this Act (now repealed but re-enacted in s. 84 of the Companies (Consolidation) Act, 1908) are set out on p. 199 *infra*, and render not merely belief, but also reasonable grounds for belief, necessary in the particular case of any prospectus or notice with regard to a company.

is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." It is important, however, to notice a later passage in the same judgment which, as was subsequently pointed out by Lindley, L.J., in the Court of Appeal in *Angus* v. *Clifford* (*e*), "qualifies the former statement in a most material manner." "In my opinion," said Lord Herschell, in the passage referred to (*f*), "making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." Therefore, as the Court of Appeal decided in *Angus* v. *Clifford* (*g*), there is no fraud for which an action will lie, if the defendant carelessly made a false statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.

There must be a representation of fact false in itself, or misleading because combined with suppression of truth (*h*).—The active concealment of a material fact is sufficient; thus it was held that

(*e*) [1891] 2 Ch. at p. 465.
(*f*) [1889] 14 App. Cas. at p. 375.
(*g*) [1891] 2 Ch. 449.
(*h*) *Peek* v. *Gurney* [1873] L. R. 6 H. L. at p. 403, per Lord Cairns.

an action of deceit lay where the vendor of a house, knowing of a defect in the wall, plastered it up and papered it over (*i*); so, too, in *Schneider* v. *Heath* (*k*), where a ship was sold "with all faults," and the vendor, knowing of a latent defect, concealed it, and made a fraudulent representation as to its condition.

An action of fraud does not lie for a mere expression of opinion or of intention.—The phrase "worth so much" has been held to be merely an expression of opinion (*l*); "gave so much for it" a representation of fact (*m*). But an action will lie if it can be proved as a fact that the opinion was not held, or that the intention was not entertained. As Bowen, L.J., observed in *Edgington* v. *Fitzmaurice* (*n*), "the state of a man's mind is as much a fact as the state of his digestion."

Non-disclosure when there is no duty to disclose is not fraud.—In *Ward* v. *Hobbs* (*o*), defendant, knowing that his pigs had a contagious disease, sent them to market, contrary to the Contagious Diseases (Animals) Act, 1869. The plaintiff bought them, there being no representation that they were sound, and one of the condi-

(*i*) Cited in *Pickering* v. *Dowson* [1813] 4 Taunt. at p. 785.
(*k*) [1813] 3 Camp. 505.
(*l*) *Harvey* v. *Young* [1602] 1 Yelv. 20.
(*m*) *Lindsay Petroleum Co.* v *Hurd* [1874] L. R. 5 P. C. 243; *Aarons Reefs* v. *Twiss* [1896] A. C. 273.
(*n*) [1885] 29 Ch. D. at p. 483.
(*o*) [1878] 4 App. Cas. 14.

tions of sale providing that the purchaser should take them "with all faults"; the greater number died, having infected other pigs belonging to the plaintiff. Held, no action lay. In *Keates* v. *Lord Cadogan* (*p*), where the defendant let a house to the plaintiff for a term of years (*q*), knowing it to be required for immediate occupation, without disclosing that it was in a ruinous condition, it was held that no action for fraud lay.

It should, however, be remembered that apart from the question of fraud the mere relation of vendor and purchaser imposes on the vendor a duty towards the purchaser of warning him that special care will be requisite if there is some dangerous quality in the goods sold of which he (the vendor) knows, but of which the purchaser cannot be expected to be aware (*r*).

There must be knowledge of falsehood or absence of belief in, or reckless disregard of truth (*s*).—In *Dickson* v. *Reuter's Telegraph*

(*p*) [1851] 10 C. B. 591.

(*q*) As to implied warranty of fitness for habitation if house be let furnished for short period, see *Smith* v. *Marrable* [1843] 11 M. & W. 5; *Wilson* v. *Finch-Hatton* [1877] 2 Ex. D. 336; *Sarson* v. *Roberts* [1895] 2 Q. B. 395.

(*r*) See the observations of Collins, M.R., in *Clarke* v. *Army & Navy, &c., Society* [1903] 1 K. B. at pp. 164, 165; *Blacker* v. *Lake* [1912] 106 L. T. 533; *Bates* v. *Batey* [1913] 3 K. B. 351.

(*s*) *Reese River Mining Co.* v. *Smith* [1869] L. R. 4 H. L. 79.

Co. (*t*), defendants by mistake in transmission of a message, caused the plaintiff to ship large quantities of barley which were not required, and which, owing to a fall in the market, resulted in heavy loss. The defendants were held not liable, the representation not being false to their knowledge. It is not permissible to allege fraud, and then claim alternatively for breach of warranty in case the plaintiff fails to prove fraud unless there is a substantial case for alleging a warranty (*u*).

Nor will an action of deceit lie for a representation which the defendant really and honestly believed to be true.—It is immaterial whether such belief was held on reasonable grounds or not (*v*), except in so far as absence of reasonable cause may go to show that there was no real belief at all (*x*). If the representation is thought to be true at the time of making it, but is subsequently discovered to be false before the other party has acted upon it, it seems on principle that the defendant would be liable. This, at any rate, was the old rule of equity, which by reason of the Judicature Acts, now prevails.

But it is not necessary to prove that the false

(*t*) [1877] 3 C. P. D. 1.

(*u*) *Heilbutt* v. *Buckleton* [1913] A. C. 30.

(*v*) *Glasier* v. *Rolls* [1889] 42 Ch. D. 436; *Low* v. *Bouverie* [1891] 3 Ch. 82. Notice, however, the provisions of the Companies (Consolidation) Act, 1908, s. 84, p. 199, *infra*.

(*x*) *Derry* v. *Peek* [1889] 14 App. Cas. 337.

representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff.—In *Polhill* v. *Walter* (*y*), the defendant accepted a bill of exchange drawn on A., representing that he had A.'s authority to do so, and honestly believing that the acceptance would be sanctioned and the bill met by A. The bill was dishonoured. Held, an action for deceit lay against the defendant by an indorsee for value.

In *Leddell* v. *McDougall* (*z*), plaintiff wrote to defendant, asking if defendant could recommend T. as a safe and responsible tenant. Defendant wrote back that "he had much pleasure in replying affirmatively," knowing T. to be a man of no means, who had failed several times in business of the same kind. Held, defendant was liable, even though the letter was written out of pure kindness, and defendant had nothing to gain by making the false representation.

By the **4th section of the Statute of Frauds** (*a*), a promise to answer for the debt, default, or miscarriage of another must be in writing and signed. The object of this provision was, however, practically evaded by a number of cases, notably *Pasley* v. *Freeman* (*b*), which were framed in tort instead of in contract.

(*y*) [1832] 3 B. & Ad. 114; see also *Peek* v. *Gurney* [1873] L. R. 6 H. L. 409.

(*z*) [1881] 29 W. R. 403.

(*a*) 29 Car. 2, c. 3. (*b*) [1789] 3 T. R. 51.

In consequence of this, **the Statute of Frauds Amendment Act, 1828, commonly called Lord Tenterden's Act (9 Geo. 4, c. 14)**, was passed, requiring every eulogy of another's conduct, credit, ability, &c., made with the object of inducing trust of such person, to be in writing and signed by the party to be charged therewith, before an action for false representation would lie. According to the better opinion, only statements really going to the assurance of personal credit are within the statute (*c*).

The statement need not be made to the injured party.—Thus, in *Langridge* v. *Levy* (*d*), defendant sold a gun to the father of the plaintiff, for the use of himself and his sons, representing that the gun was made by Nock, and was sound. Plaintiff used the gun, which exploded, injuring his hand. Held, defendant was liable. **The statement must, however, be made with the intention that the plaintiff should act upon it** (*e*); and therefore, in *Peek* v. *Gurney* (*f*), directors, who would have been liable to original allottees of shares for false statements in the prospectus of a company, were held not

(*c*) Per Parke and Alderson, BB., in *Lyde* v. *Barnard* [1836] 1 M. & W. 101; see also *Bishop* v. *Balkis Consolidated Co.* [1890] 25 Q. B. D. 512.

(*d*) [1837] 2 M. & W. 519.

(*e*) *Tackey* v. *McBean* [1912] A. C. 186.

(*f*) [1873] L. R. 6 H. L. 377. This case was distinguished in *Andrews* v. *Mockford* [1896] 1 Q. B. 372.

liable to subsequent purchasers of shares which came into the market. **And the injury must be the immediate, not the remote, consequence of the representation thus made** (*g*).

Deceit which does not deceive is not fraud.—Thus, in *Horsfall* v. *Thomas* (*h*), the defendant sold a cannon to the plaintiff, having concealed a defect in it. Plaintiff never inspected the cannon, which, owing to the defect, burst on being used. Held, defendant was not liable, as plaintiff never inspected the cannon, and was not deceived by the attempted fraud (*i*).

The fact that the party deceived has the means at hand of finding out the truth is immaterial, if he made no actual independent inquiry (*j*). A mere perfunctory inquiry on the part of the party deceived is not sufficient (*k*). Thus, to escape liability the defendant may prove that the other party (1) knew the truth; or (2) relied wholly on his own investigation; or (3) was not really influenced in his conduct by the defendant's misrepresentation.

The position of **directors and promoters of companies** differs from that of the ordinary defendant in an action of deceit. **By the Companies (Con-**

(*g*) *Peek* v. *Gurney*, *supra*.
(*h*) [1862] 1 H. & C. 90.
(*i*) See also *Smith* v. *Chadwick* [1882] 20 Ch. D. 27; and *Pasley* v. *Freeman* [1789] 3 T. L. R. 51.
(*j*) *Dobell* v. *Stevens* [1825] 3 B. & C. 623.
(*k*) *Redgrave* v. *Hurd* [1881] 20 Ch. D. 1.

solidation) Act, 1908, s. 84 (*l*), directors, promoters, and persons who have authorized the issue of any prospectus or notice with regard to a company, are liable for loss or damage, caused by an untrue statement therein, to any person who has subscribed for any shares or debentures on the faith of such prospectus or notice, unless it is proved (a) that they not only believed in the statement but had reasonable ground for such belief; or (b) that it was a correct statement of the report or valuation of an engineer, valuer, accountant, or other expert, and even then they will be liable if it be proved that they had no reasonable ground for believing that such person was competent to make such report or valuation; or (c) that such statement was a correct and fair representation of a statement made by an official person, or contained in a public official document.

Misrepresentations made by agents.

The **agent himself is personally liable,** according to the general rules governing the law as to fraud. The liability of the principal depends on several considerations. The following cases appear on this matter:—

I. The principal knows the representation to be false.

(*l*) 8 Edw. 7, c. 69. The liability imposed by the section is nevertheless founded in tort, so that the maxim *Actio personalis moritur cum persona* applies : *Geipel* v. *Peach* [1917] 2 Ch. 108.

(i) **He authorizes the making** of it. In this case, whether the agent knows it to be false or thinks it to be true, the principal is liable.

(ii) **The representation is made by the agent in the general course of his employment,** but without any specific authorization from the principal. When

(a) **The agent knows it to be false,** the principal is liable (*m*);

(b) **The agent thinks it to be true.** In this case the contract may always be rescinded; but will an action for fraud lie against the principal? The two following distinctions must be remembered:—

(α) *When the principal fraudulently keeps the knowledge from the agent,* he is no doubt liable. This was admitted by all the Barons in *Cornfoot* v. *Fowke* (*n*), and followed in *Ludgater* v. *Love* (*o*), where a father knowingly directed his son to make a false representation about the condition of some sheep.

(β) *When the knowledge is held back by the principal through inadvertence.* In this case it is probable that an action

(*m*) Per Parke, B., in *Cornfoot* v. *Fowke* [1840] 6 M. & W. 358.

(*n*) [1840] 6 M. & W. 358.

(*o*) [1881] 44 L. T. N. S. 694

will lie against the principal, though this would be contrary to the decision in *Cornfoot* v. *Fowke* (*p*), where there was a mis-statement by the agent in good faith, and there was no suggestion of fraud on the part of the principal, about the condition of a house, and it was held that the plaintiff could not get out of his agreement on the ground of fraud. "I think," said Alderson, B., "it is impossible to sustain a charge of fraud, when neither the principal nor agent has committed any; the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it: and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*." Abinger, C.B., dissented, and it is very probable that this case will be overruled: if, indeed, it is even now law. Many dicta are to be found adverse to this decision, those of Lord St. Leonards in *National Exchange &c.* v. *Drew* (*q*), and Willes, J., in

(*p*) [1840] 6 M. & W. 358.
(*q*) [1855] 3 Macq. at p. 144.

Barwick v. *Eng. Joint Stock Bank* (*r*) being especially worthy of notice.

II. The principal thinks the representation to be true.

(i) He authorizes it to be made. When

(a) The agent knows at the time, or finds out afterwards, that it is false, the principal is liable (*r*);

(b) The agent thinks it to be true—here the principal is NOT liable.

(ii) The agent makes the representation in the general course of his employment, but without any specific authorization. When

(a) The agent knows it is false—the principal is liable (*s*). It has been suggested that this liability is limited to the amount of profit made, though in *Swire* v. *Francis* (*t*), the Privy Council held a principal liable who derived no profit at all. It is, however, possible that the limitation suggested would be held applicable if the defendant were a cor-

(*r*) [1867] L. R. 2 Ex. 259.

(*s*) *Udell* v. *Atherton* [1861] 7 H. & N. 181; and *Barwick* v. *Eng. Joint Stock Bank* [1867] L. R. 2 Ex. 259.

(*t*) [1877] 3 App. Cas. 106.

poration (*u*); though the point was not taken in *Denton* v. *G. N. Rail. Co.* (*x*).

(b) The agent thinks it to be true—the principal is NOT liable.

Thus the principal is liable in all possible cases, except when both he and his agent believe the latter's misrepresentation to be the truth. He cannot evade liability merely by inserting, in the contract with the plaintiff, a clause disclaiming responsibility for representations made by his servants or agents (*y*).

If a man makes a fraudulent statement to another who acts upon it to his prejudice, it is no defence to prove that the true facts were known to the other's agent (*z*).

(*u*) Per Lord Cranworth, in *Western Bank of Scotland* v. *Addie* [1867] L. R. 1 Sc. App., at pp. 166, 167; and see the observations of Bowen, L.J., in *British, &c., Co.* v. *Charnwood, &c. Co.* [1887] 18 Q. B. D. at p. 719.

(*x*) [1856] 5 E. & B. 860.

(*y*) *Pearson* v. *Dublin Corporation* [1907] A. C. 351.

(*z*) *Wells* v. *Smith* [1914] 3 K. B. 722.

CHAPTER X.

OF THE DUTY TO ABSTAIN FROM NEGLIGENCE, AND OF CERTAIN WIDER DUTIES IMPOSED IN SPECIAL CASES.

In all cases of negligence, and, indeed, in all cases of tort, **a man is answerable only for such consequences of his wrongful act or omission as,** in the ordinary course of affairs, **are the natural and probable consequences** of such wrongful act or omission (*a*). Thus, in *Scott* v. *Shepherd* (*b*), the defendant threw a lighted squib into a crowded market place, where it was pitched about from hand to hand until it burst, putting out the eye of the plaintiff. The defendant was held liable. The plaintiff must prove that the negligence of the defendant was the effective cause of the injury complained of (*c*). Two cases, one on each side of the line, may be usefully con-

(*a*) See "The Common Law," by Mr. Justice O. W. Holmes, Lecture III., especially pp. 108 *et seq.*

(*b*) [1773] 2 W. Bl. 892.

(*c*) Per Lord Esher, M.R., in *Englehart* v. *Farrant* [1897] 1 Q. B. at p. 243, and per Vaughan Williams, L.J., in *McDowall* v. *G. W. Ry. Co.* [1903] 2 K. B. at p. 338.

sidered. In *Sharp* v. *Powell* (*d*), the defendant's servants washed a van in the street, in contravention of the Metropolitan Police Act. The water so used would, under ordinary circumstances, have escaped through a grating; but owing to a severe frost the grating had previously become blocked up with ice, and the water, not being able to escape, formed a sheet of ice. Upon this sheet of ice plaintiff's horse slipped and was injured. Held, the defendant was not liable, as the injury was not the natural consequence of his act. But in *Clark* v. *Chambers* (*e*), the defendant wrongfully placed a barrier with spikes across the road, leaving an opening for the purposes of traffic. A third party placed one of these spikes in the roadway. The plaintiff, lawfully passing along the road at night, was injured by this spike. Held, that the defendant was liable, as the injury was the natural and probable consequence of his act.

Actual impact is not necessary. A person who has suffered physical injury through nervous shock caused by the defendant's negligence or conduct has a cause of action (*f*), but not where such damage is too remote, *e.g.*, damage which

(*d*) [1872] L. R. 7 C. P. 253. Cf. *Sherwell* v. *Alton U. D. C.* [1909] 25 T. L. R. 417.

(*e*) [1878] 3 Q. B. D. 327.

(*f*) *Dulieu* v. *White & Sons* [1901] 2 K. B. 669. See also *Wilkinson* v. *Downton* [1897] 2 Q. B. 57; *Janvier* v. *Sweeney* [1919] 2 K. B. 316.

results from shock caused by seeing a man killed through defendant's negligence (*g*).

Negligence is the breach of a duty (a) **to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do,** *or* (b) **to abstain from doing something which a prudent and reasonable man would not do** (*h*).

It is important to remember that the defendant will not be legally responsible for not exercising the diligence of an average reasonable man, unless he is so situated that he is under a duty to exercise such diligence towards the person injured (*i*). In the words of Lopes, L.J. (*k*), "there cannot be a liability for negligence unless there is a breach of some duty."

(*g*) *Smith* v. *Johnson*, unreported (see [1901] 2 K. B. at p. 675).

(*h*) See the judgment of Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.* [1856] 25 L. J. Ex. at p. 213, and of Blackburn, J., in *Swan* v. *North British Australasian Co.* [1863] 2 H. & C. 175. For the duties of an occupier of premises, see *ante*, pp. 64—72, 86—87.

(*i*) See Pollock, 11th ed. p. 442.

(*k*) *Lane* v. *Cox* [1897] 1 Q. B. at p. 418. See also *Neuwith* v. *Over-Darwen Society* [1894] 63 L. J. Q. B. 290; *Le Lièvre* v. *Gould* [1893] 1 Q. B. 491; *Schofield* v. *Lord Londesborough* [1896] A. C. 514; *Cal. Ry. Co.* v. *Mulholland* [1898] A. C. 216; *Earl* v. *Lubbock* [1905] 1 K. B. 253; *Longman* v. *Bath* [1905] 1 Ch. 646; *Colonial Bank* v. *Marshall* [1906] A. C. 559; *De la Bere* v. *Pearson* [1908] 1 K. B. 280 (C. A.); *Holland* v. *Manchester and Liverpool &c. Bank* [1909] 25 T. L. R. 386; and *Dawson* v. *Bingley U. D. C.* [1910] 27 T. L. R. 46

In *Blyth* v. *Birmingham Waterworks Co.* (*l*) it was held that a water company, which observed directions laid down by Act of Parliament in putting down their pipes, was not liable for negligence merely because the precautions which it had taken proved insufficient against the effects of a winter of extreme coldness, such as no ordinary person could have foreseen.

In *Holmes* v. *Mather* (*m*), defendant's horses, driven by defendant's servant, bolted and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. While trying to turn a corner safely, the servant guided them so that, unintended by him, they knocked down and injured plaintiff. Held, defendant was not guilty of negligence. Bramwell, B., is reported to have said (*n*):—"The driver is absolutely free from all blame in the matter. Not only does he not do anything wrong, but he endeavours to do that which is best under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they ran away with the groom and the defendant who is sitting beside him. Now, if the plaintiff, under such circumstances, can bring an action, I really cannot see why she

(*l*) [1856] 25 L. J. Ex. 212.

(*m*) [1875] L. R. 10 Ex. 261. See also *Manzoni* v. *Douglas* [1881] 6 Q. B. D. 145; *Stanley* v. *Powell* [1891] 1 Q. B. 86.

(*n*) L. R. 10 Ex. at p. 267; cf. *The Boucau* [1909] P. 163.

could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye and so injured her. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."

The fact that the defendant was under contract with a third party does not *per se* give a right of action to a person injured by his breach of it (*o*).

Carriers of passengers are not, like carriers of goods, insurers. Their duty is **to take due care (including in that term the use of skill and foresight)**, and is not a warranty that the carriage is, in every respect, fit for its purpose. In *Readhead* v. *Midland Railway Co.* (*p*), where the accident was caused by a latent defect in a vehicle, which it was impossible, with the exercise of all due care, caution, and skill, to have discovered, it was held, that the railway company was not liable. Where, however, there is a sale

(*o*) *Cavalier* v. *Pope* [1906] A. C. 428; *Cameron* v. *Young* [1908] A. C. 176; *Midleton* v. *Hall* [1913] 108 L. T. 804; *Dobson* v. *Horsley* [1913] 30 T. L. R. 148; *Ryall* v. *Kidwell* [1914] 3 K. B. 135.

(*p*) [1869] L. R. 4 Q. B. 379; as to limitation of liability, see *Smitton* v. *Orient S. N. Co.* [1907] 96 L. T. 846; but see *Clarke* v. *West Ham Corporation*, p. 244, *infra*.

of a chattel for a specific purpose, and therefore an implied warranty that the chattel is reasonably fit for such purpose, the defendant, even though not guilty of negligence, is liable for an accident caused by a latent defect in the chattel; thus, in *Randall* v. *Newson* (*q*), plaintiff bought a pole for his carriage from the defendant, a coachbuilder. The pole broke in use, and the horses, becoming frightened, were injured. The jury found that the pole was not reasonably fit for the carriage, but that defendant was not negligent. Held, that the defendant was liable.

Province of judge and jury in actions for negligence.—The judge has to say whether, if any facts are established by evidence to the satisfaction of the jury, negligence **may** be reasonably inferred from those facts; **the jurors** have to say whether from those facts, when submitted to them, negligence ought to be inferred (*r*).

What must plaintiff prove before the judge can allow the evidence to go to the jury?

(1) **Where there is no contract between the parties,** plaintiff must prove facts inconsistent with due diligence on defendant's part (*s*). Thus, no negligence can be

(*q*) [1877] 2 Q. B. D. 102.

(*r*) Per Cairns, L.C., in *Metro. Ry. Co.* v. *Jackson* [1877] L. R. 3 App. Cas. 197; and see *Toronto Ry. Co.* v. *King* [1908] A. C. 260.

(*s*) And he may support this by evidence that the defendant

inferred from the fact of a foot-passenger being knocked down by a carriage where both have an equal right to be, or by a train at a level crossing. "Where the balance is even as to which party is in fault, the one who relies upon the negligence of the other is bound to turn the scale" (*t*).

A mere error of judgment is not negligence (*u*), nor is it negligence if the defendant forces the plaintiff into a position in which he must take one of two risks if he makes an unfortunate choice (*x*).

The mere fact that the defendant sends out a motor bus on a wet day, knowing that it is liable to skid on such days, is not evidence of negligence (*y*).

(2) **Where there is a contract between the parties, and, probably, where there is a**

was, as a rule, lacking in due diligence if that evidence throws light on the matter in issue : *Hales* v. *Kerr* [1908] 2 K. B. 601.

(*t*) Per Erle, C.J., in *Cotton* v. *Wood* [1860] 8 C. B. N. S. 568; *Hammack* v. *White* [1862] 11 C. B. N. S. 588; *Wakelin* v. *L. & S. W. Ry. Co.* [1886] 12 App. Cas. 41; *Smith* v. *S. E. Ry. Co.* [1895] 1 Q. B. 178; *Mackenzie* v. *Chilliwack* [1912] A. C. 888.

(*u*) *Faithful* v. *Kesteven* [1910] 103 L. T. 56; but see *Leaver* v. *Pontypridd U. D. C.* [1912] 76 J. P. 31 (H. L.).

(*x*) *The Highland Loch* [1912] A. C. 312.

(*y*) *Wing* v. *London G. O. Co.* [1909] 2 K. B. 652 (C. A.). See also *Walton* v. *Vanguard Motor Bus Co.* [1908] 72 J. P. 505; *Barnes U. D. C.* v. *London G. O. Co.* [1909] 100 L. T. 115; *Parker* v. *London G. O. Co.* [1909] 101 L. T. 623.

personal undertaking without a contract, plaintiff need only prove such contract or personal undertaking and injury to himself. It is for the defendant to prove that he himself was exercising due care, *e.g.*, a collision between trains under defendant company's control, whereby a passenger is injured, is *primâ facie* proof of negligence, and it is upon defendant to rebut such presumption if he can (*z*). So, too, if the railway servants allow the trains to start with the doors unfastened and a passenger is thereby injured (*a*); but the mere fact that the train overshot the platform is, of itself, no proof of negligence (*b*). Again, if a bailee lose goods entrusted to him it lies on him to disprove negligence (*c*). And even in this class of cases, no action lies unless actual damage is sustained (*d*).

(3) Again, there is a presumption of negligence **when the cause of mischief is apparently under the defendant's control.** In *Scott*

(*z*) *Carpue* v. *L. & B. Ry. Co.* [1844] 5 Q. B. 747, 751. Cf. *E. I. R. Co.* v. *Kalidas Mukarjee* [1901] A. C. 396.

(*a*) *Toal* v. *N. B. Ry. Co.* [1908] A. C. 352.

(*b*) *Anthony* v. *M. Ry. Co.* [1909] 100 L. T. 117; and see *Lever* v. *Pontypridd U. D. C.* [1912] 76 J. P. 31 (H. L.).

(*c*) *Phipps* v. *New Claridge's Hotel* [1905] 22 T. L. R. 49; cf. *Williams* v. *Parsons* [1909] 26 T. L. R. 78 (C. A.).

(*d*) *Cole* v. *Christie* [1910] 26 T. L. R. 469; *La Société Anonyme de Remorquage* v. *Bennett* [1911] 1 K. B. 243.

v. *London Dock Co.* (*e*), a custom-house officer, being lawfully and by right in certain docks, was knocked down by a bag of sugar, which fell from defendant's crane. In *Kearney* v. *L. B. & S. C. Railway Co.* (*f*), a brick fell from defendant's bridge on plaintiff walking in the road below. In *Byrne* v. *Boadle* (*g*) a bag of flour fell from defendant's warehouse, in Liverpool, on plaintiff walking in the street below. In all these cases *res ipsa loquitur*, it being held that the mere unexplained fact of the accident happening at all was evidence of negligence.

In actions against local highway authorities and certain other bodies, the plaintiff must prove that the defendant authority not merely omitted to do their duty (nonfeasance) but actually did something inconsistent with their duty (misfeasance) (*h*).

(*e*) [1865] 34 L. J. Ex. 220; and see *Dominion Natural Gas Co.* v. *Collins* [1909] A. C. 640.

(*f*) [1871] L. R. 6 Q. B. 759.

(*g*) [1863] 2 H. & C. 722. Cf. *Chapronière* v. *Mason* [1905] 21 T. L. R. 633; *Wiehe* v. *Dennis* [1913] 29 T. L. R. 250.

(*h*) See, for instance, *Bathurst* v. *Macpherson* [1879] 4 App. Cas. 256; *Hartley* v. *Rochdale Corporation* [1908] 2 K. B. 594; *Osborn* v. *Metropolitan Water Board* [1910] 27 T. L. R. 103; *Rosenbaum* v. *Metropolitan Water Board* [1910] 103 L. T. 284; *Napworth* v. *Battersea Corporation* [1914] 2 K. B. 89; *Baldwin* v. *Halifax Corporation* [1916] 85 L. J. K. B. 1769; and as to statutory duties generally, *Tozeland* v. *West Ham Guardians* [1907] 1 K. B. 920.

The doctrine of contributory negligence. — Though negligence whereby actual damage is caused is actionable, yet if plaintiff has himself been guilty of such negligence as is in reality the **proximate** or **decisive** cause of the injury complained of, **and but for which such injury would not have happened,** he cannot recover. Not every act of negligence on plaintiff's part will prevent him from recovering; "only **if he has been negligent in the final stage, and at the decisive point of the event,** so that the mischief, as and when it happens, is immediately due to his own want of care, and not to the defendants (*i*).

In *Fordham* v. *L. B. & S. C. Railway Co.* (*k*), defendant's guard, **without warning,** forcibly closed the door of a railway carriage, thereby injuring the hand of the plaintiff, who was in the act of getting into the carriage, the train not being in motion. Held, there was no contributory negligence on plaintiff's part. In *Richardson* v. *Metropolitan Railway Co.* (*l*), the facts were similar, **but the guard gave due warning before shutting the door.** Held, that plaintiff

(*i*) Pollock, 11th ed., pp. 462—480. This defence must be specially pleaded, thus differing from the defence of inevitable accident which can be raised by a mere denial of negligence: *Rumbold* v. *London C. C.* [1909] 25 T. L. R. 541.

(*k*) [1868] L. R. 3 C. P. 368.

(*l*) [1868] L. R. 3 C. P. 374, n. The later cases of *Drury* v. *N. E. Ry. Co.* [1901] 2 K. B. 322, and *Taylor* v. *Great Southern and Western Ry. Co.* [1909] 2 Ir. R. 330, may be usefully compared with these two cases.

was disentitled, by his contributory negligence from recovering. In *Butterfield* v. *Forrester* (*m*), plaintiff, riding violently home in the dusk, came against a pole left by defendant in the highway, and was thrown from his horse and injured. Held, defendant was not liable, owing to plaintiff's contributory negligence.

Another way of stating the above rule is, that plaintiff's negligence will not prevent him from recovering, if defendant, by being ordinarily careful, might have averted the consequence of such negligence. The leading case, which may be said to have settled the doctrine of contributory negligence in its modern form, is *Tuff* v. *Warman* (*n*), which was an action against the pilot of a Thames steamer for running down a barge. Though no look-out was kept on the plaintiff's barge, defendant was held liable on the above ground. The earlier and well-known case of *Davies* v. *Mann* (*o*) is an illustration of the same rule. In that case the plaintiff had negligently left his donkey, with its legs tied, in the public highway, and defendant drove over and killed it. Held, defendant was liable on the above ground.

Again, if the plaintiff knows of the danger

(*m*) [1809] 11 East, 60.

(*n*) [1857-8] 2 C. B. N. S. 740; 5 C. B. N. S. 573; *Paul* v. *G. E. Ry.* [1920] 36 T. L. R. 344.

(*o*) [1842] 10 M. & W. 546.

caused by the defendant's negligence, but nevertheless continues, he elects to take the risk, and cannot complain if he is injured (*p*).

It is contrary to the Highway Act, 1864, to allow animals to stray on the highway, but the mere fact that they are so straying is not enough to give a cause of action to anyone who falls over them (*q*).

In *Wakelin* v. *L. & S. W. Railway Co.* (*r*), an action under Lord Campbell's Act was brought by the widow of a man who was found killed on a level crossing of defendant company's line, there being no evidence as to how he came to be there. The defendant company was held not liable; for even assuming (but without deciding) that there was evidence of defendant company's negligence, there was no evidence to connect such negligence with the accident.

Contributory negligence of children.—A child is to be judged as a child, and is not to be expected to exercise the same amount of care as a person of mature years. He must not, how-

(*p*) *Torrance* v. *Ilford U. D. C.* [1909] 73 J. P. 225 (C. A.); see also the observations in *Cavalier* v. *Pope* [1906] A. C. 428, at p. 432; and *Brackley* v. *M. R.* [1916] 85 L. J. K. B. 1596; but see *Gould* v. *Birkenhead Corpn.* [1910] 74 J. P. 106.

(*q*) *Heaths Garage* v. *Hodges* [1916] 2 K. B. 370; cf. *Ruoff* v. *Long* [1916] 1 K. B. 148; *Hadwell* v. *Righton* [1907] 2 K. B. 345; and *Cox* v. *Burbidge*, p. 222, *infra*.

(*r*) [1887] 12 App. Cas. 41. See also *Davey* v. *L. & S. W. Ry. Co.* [1883] 12 Q. B. D. 70; and cf. *Smith* v. *S. Eastern Ry. Co.* [1896] 1 Q. B. 178; *Mackenzie* v. *Chilliwack Corpn.* [1912] A. C. 888.

ever, get into mischief to the extent of doing what he knows to be wrong (*s*). If he does, he is guilty of contributory negligence, which will disentitle him from recovering.

In *Lynch* v. *Nurdin* (*t*), defendant negligently left a horse and cart unattended in the street. Plaintiff, aged seven, climbed on the cart in play, and another child led the horse on, whereby plaintiff was thrown down and hurt. Held, that defendant was liable on the above ground. This case was doubted in *Lygo* v. *Newbold* (*u*); and the tendency of later authorities is in the direction of limiting defendant's responsibility in such cases (*x*).

In *Abbott* v. *Macfie* (*y*), plaintiff, aged seven, got upon the cover of a cellar left leaning against a wall by defendant. The cover fell, injuring plaintiff. Held, he could not recover. In *Mangan* v. *Atterton* (*z*), defendant left un-

(*s*) See *Planza* v. *Glasgow Corpn.* [1910] S. C. 780.

(*t*) [1841] 1 C. B. 29; approved by C. A., in *Harrold* v. *Watney* [1898] 2 Q. B. 320; and see *Barker* v. *Herbert* [1911] 2 K. B. 633.

(*u*) [1854] 9 Ex. 302.

(*x*) See on the whole topic *Cooke* v. *Midland G. W. Ry. Co.* [1909] A. C. 229; and the discussion on its effect in *Latham* v. *Johnson* [1913] 1 K. B. 398; distinguished in *Crane* v. *S. Sub. Gas. Co.* [1916] 1 K. B. 33; see also *Jenkins* v. *G. W. Ry. Co.* [1912] 1 K. B. 525; *Hardy* v. *C. L. R.* [1920] 36 T. L. R. 843.

(*y*) [1864] 33 L. J. Ex. 177; *Jackson* v. *L. C. C.* [1912] 76 J. P. 217.

(*z*) [1866] L. R. 1 Ex. 239; see, however, *Clark* v. *Chambers* [1878] 3 Q. B. D. at pp. 338, 339.

attended a machine which anyone could set in motion, and plaintiff, aged four, by the direction of his brother, aged seven, put his hands in the machine while his brother turned the wheel. The plaintiff was injured, but it was held that defendant was not liable. In *Singleton* v. *Eastern Counties Railway Co.* (*a*), plaintiff, aged three, was injured by a passing train while sitting on a railway parapet. Held, that the company was not liable, rather, however, on the ground that there was no evidence of negligence against the defendant than that the plaintiff was disentitled from recovering by reason of contributory negligence.

The common law rule of contributory negligence is not part of the maritime law administered in courts of Admiralty jurisdiction, the loss being borne in proportion to the degree in which each vessel was in fault, and if it is not possible to determine the respective degrees, then equally (*b*). In regard to personal injuries the liability of the vessels towards the person injured is joint and several (*c*), but there is a right of contribution if one vessel is cast in damages for personal injuries to a greater extent than the proportion of blame found against her (*d*).

(*a*) [1859] 7 C. B. N. S. 287.
(*b*) Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 1.
(*c*) *Ibid.*, s. 2.
(*d*) *Ibid.*, s. 3.

Doctrine of identification.—According to *Thorogood* v. *Bryan* (*e*) if A., travelling in B.'s carriage, driven by B.'s servant, is injured in a collision with C.'s carriage, the negligence of B.'s servant being the **proximate** cause of the accident, A. was considered to be so identified with B. as to be disentitled from suing C. This is no longer the law since the judgment of the Court of Appeal in *The Bernina* (*f*), in which case there was a collision between two ships, both in fault. The officer in charge, the chief engineer off duty, and a passenger, all belonging to the same ship, were drowned. Held, in an action against the owners of the other ship, overruling *Thorogood* v. *Bryan* (*e*), that the representatives of the officer in charge, who was directly responsible for the navigation of the ship at the time of the collision, could recover nothing, but that the representatives of the chief engineer and passenger could do so; the law being that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of

(*e*) [1849] 8 C. B. 115.

(*f*) [1887] 12 P. D. 36; affirmed by the House of Lords, nom. *Mills* v. *Armstrong* [1888] 13 App. Cas. 1. As to costs in actions in which two persons are jointly sued for damages for personal injuries caused by a collision between them see *Besterman* v. *British Motor Cab Co.* [1914] 3 K. B. 181.

plaintiff himself, or of those who are really his agents. *Waite* v. *N. E. Railway Co.* (*g*) was distinguished and approved on the ground that persons dealing with an **adult** and also with an **infant or imbecile of whom the adult has charge,** are entitled to expect reasonable care on the part of the adult, both for himself and for the helpless person in his charge. In the case last cited (*g*), the plaintiff, a little boy aged five, and his grandmother, were knocked down in crossing a line; the former was much injured, the latter killed. Held, that the little boy was so identified with his grandmother that her negligence was his, and, on this ground, that the plaintiff was disentitled from recovering by reason of contributory negligence.

Of certain Wider Duties imposed by the Policy of the Law in certain Special Cases.

"Everyone must so use his own as not to do damage to another." This was laid down as law more than two hundred years ago by Holt, C.J., in *Tenant* v. *Goldwin* (*h*), and it is the principle of the leading case of *Rylands* v. *Fletcher* (*i*), a principle which was reasserted in the later case

(*g*) [1859] E. B. & E. 719; and see *Taylor* v. *Dumbarton* [1918] S. C. 96 (H. L.).
(*h*) [1705] 2 Lord Raym. 1092.
(*i*) [1868] L. R. 3 H. L. 330.

of *The Eastern and South African Telegraph Co., Ltd.* v. *The Capetown Tramways Co., Ltd.* (*j*), and was declared to apply to cases where the artificial source of danger which the land-owner accumulates is electricity (*k*). The manufacture or storing of explosives also imposes such a duty (*l*).

Sic utere tuo ut alienum non lædas. "A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape" (*m*). In *Rylands* v. *Fletcher* (*n*), the defendants employed a com-

(*j*) [1902] A. C. 381.

(*k*) But on the particular facts of this case it was held that the plaintiffs could not recover because the damage complained of, done by the escape of the electricity, namely, irregularity in the working of the plaintiffs' own electric cables, did not amount to an interference with the *ordinary* use of property, to which alone the extreme responsibility established in *Rylands* v. *Fletcher* extends. See further on this point Kenny's Cases on the Law of Tort, p. 60, Cambridge University Press, 1904.

(*l*) *Belvedere* v. *Rainham* [1920] 2 K. B 487; cf. *Miles* v. *Forest Rock Co.* [1918] 34 T. L. R. 500; and *Grayson* v. *Ellerman Lines* [1920] A. C. 466.

(*m*) Per cur. in *Fletcher* v. *Rylands* [1866] L. R. 1 Ex. 277; cited with approval by Cairns, L.C., in the House of Lords [1868] L. R. 3 H. L. at p. 339.

(*n*) [1868] L. R. 3 H. L. 330; *Whitmores* (*Edenbridge*) v. *Stanford* [1909] 1 Ch. 427; *Charing Cross* v. *London Hydraulic Co.* [1914] 3 K. B. 772; *Goodbody* v. *Poplar* [1915] 84 L. J. K. B. 1230.

petent engineer to make them a reservoir. Certain old mine shafts were discovered and filled in unknown to the defendants. The water escaped through the shafts and injured plaintiff's mine. Held, the defendants were liable without any question of negligence. Such a person is not, however, responsible if the escape is due to—

(1) Causes beyond his own control, and amounting to act of God, *i.e.*, an accident "due to natural causes directly and exclusively, without human intervention," and such "that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected" (*o*). In *Nichols* v. *Marsland* (*p*), the defendant owned artificial lakes formed by damming a natural stream, into which the water was finally let off by a system of weirs. Owing to a violent storm, an overflow occurred which carried away four county bridges, whereby the action. Held, defendant was not liable;

(2) Plaintiff's fault;

(3) Wrongful act of third party (*q*);

(*o*) Per James, L.J., in *Nugent* v. *Smith* [1876] 1 C. P. D. at p. 444.

(*p*) [1875] L. R. 10 Ex. 355; and see *Greenock Corporation* v. *Caledonian Ry.* [1917] A. C. 556; *Hudson* v. *Bray* [1917] 1 K. B. 520.

(*q*) *Box* v. *Judd* [1879] 4 Ex. D. 76; *Richards* v. *Lothian* [1913] A. C. 263.

(4) Artificial work maintained for the common benefit of plaintiff and defendant. In *Carstairs* v. *Taylor* (*r*), the defendant was the plaintiff's landlord, and was living on the floor above him. Some rats gnawed a rain-water box maintained by the defendant for the benefit both of himself and the plaintiff, and the water running through injured plaintiff's goods below. Held, no action lay;

(5) An act authorised by statute (*s*).

This of course, however, pre-supposes that the damage has been **solely** caused by the act of God, or of a third party, &c., and that the defendant had not contributed to it by some distinct breach of duty, as in *Nitro-Phosphate Co.* v. *Lond. & St. Kath. Dock Co.* (*t*), for in such a case the defendant will not be excused.

Keeping in Cattle.—The owner of cattle must keep them from straying on the land of others **at his peril,** though he is liable only for natural and probable consequences, not for an unexpected event—*e.g.*, damages caused by the kick of a horse not known to be vicious (*u*).

(*r*) [1871] L. R. 6 Ex. 217; cf. *Anderson* v. *Oppenheimer* [1880] 5 Q. B. D. 602.

(*s*) *Dixon* v. *Metropolitan Board of Works* [1881] 7 Q. B. D. 418; and see pp. 26—29, *supra*.

(*t*) [1878] 9 Ch. D. 503.

(*u*) *Cox* v. *Burbidge* [1863] 13 C. B. N. S. 430; *Bradley* v. *Wallaces* [1913] 3 K. B. 629; see also *Jones* v. *Lee* [1912] 106

But this rule has no application to damage done by **cattle straying off a highway along which they are being lawfully driven.** In such a case the owner is only liable on proof of negligence. In *Tillett* v. *Ward* (*x*), an ox whilst being driven through a town, ran into a shop, and there did damage. Held, the owner was not liable.

Liability of owners of ferocious animals for injuries committed by them.

The rule is that "if a man keep (*y*) an animal whose nature is ferocious or an animal of a class not generally ferocious but which is known to the owner to be dangerous . . . he is bound to keep it secure at his peril" (*z*). There are two classes of cases. The owner is:—

1. **Always liable for injuries of animals naturally ferocious**—*i.e.*, animals by their very nature likely to do injury. "Though he has no particular notice that he did any such thing before, yet if it be a beast that

L. T. 123; *Ellis* v. *Banyard* [1912] 106 L. T. 51; *Catchpole* v. *Minster* [1914] 109 L. T. 953; *Coaker* v. *Willcocks* [1911] 2 K. B. 124. The placing of entire animals on a common may be made a summary offence under the Commons Act, 1908 (8 Edw. 7, c. 44), s. 1.

(*x*) [1882] 10 Q. B. D. 10; *Higgins* v. *Searle* [1909] 100 L. T. 280 (C. A.); *Hadwell* v. *Righton* [1907] 2 K. B. 345; and see p. 215, *supra*.

(*y*) The mere fact that a man's daughter, aged seventeen years, lives with him does not make him liable for what her dog does: *North* v. *Wood* [1914] 1 K. B. 629.

(*z*) Per Cozens-Hardy, M.R., in *Baker* v. *Snell* [1908] 2 K. B. p. 828.

is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage" (*a*). Thus, in *May* v. *Burdett* (*b*), the owner of a monkey was held liable for the animal biting a lady, and in *Filburn* v. *The People's Palace and Aquarium Co., Limited* (*c*), the plaintiff recovered damages for injuries inflicted upon him by an elephant exhibited by the defendants.

2. **Liable for injuries of animals not naturally ferocious**—*i.e.*, animals not by their nature likely to do injury—**on proof of scienter,** *i.e.*, previous knowledge of the creature's mischievous propensities (*d*). This duty also involves the giving of warning to any person who hires it or whom the defendant knows, or ought to contemplate, will use it (*e*). It was formerly held that the owner of sheep or cattle worried by a dog could not recover damages from the owner of the dog without proof of *scienter* (*f*). Now, however,

(*a*) Hale's Pleas of the Crown, vol. i. p. 430.
(*b*) [1846] 9 Q. B. 101.
(*c*) [1890] 25 Q. B. D. 258.
(*d*) *Baker* v. *Snell* [1908] 2 K. B. 825; *Clinton* v. *Lyons* [1912] 3 K. B. 198 (cat with kittens); but see *Lowery* v. *Walker* [1911] A. C. 10.
(*e*) *White* v. *Steadman* [1913] 3 K. B. 340.
(*f*) See *Gordon* v. *Mackenzie* [1913] S. C. 109.

"a dog is no longer entitled even to one worry," for by the **Dogs Act, 1906** (*g*), the owner of worried sheep or cattle can recover damages without proof of *scienter* or negligence of the owner. The term "cattle" now expressly includes mules, asses, sheep, goats, and swine (*h*).

It seems that in both these cases the owner is liable even where the injury is caused by the independent act of a third person (*i*).

At common law a man was bound **at his peril** to keep his own **fire** safely so as not to do damage to another; but by the Building Act of 1744 **(14 Geo. 3, c. 78), s. 86,** as interpreted in *Filliter* v. *Phippard* (*k*), a man is not liable for damage caused by a fire which began in his house or on his land, provided that it originated by accident, and without negligence.

A man who brings fire dangerously near the property of another, *e.g.*, by running a locomotive engine without express statutory authority, or by running a traction engine on the highway, does so **at his peril** (*l*).

(*g*) 6 Edw. 7, c. 32.
(*h*) *Ibid.*, sect. 7.
(*i*) *Baker* v. *Snell*, *supra*.
(*k*) [1847] 11 Q. B. 347; and see *Musgrove* v. *Pandelis* [1919] 2 K. B. 43.
(*l*) *Jones* v. *Festiniog Railway Co.* [1868] L. R. 3 Q. B. 733; *Powell* v. *Fall* [1880] 5 Q. B. D. 597; *Sadler* v. *South Staffordshire, &c., Co.* [1889] 23 Q. B. D. 17; *Gunter* v. *James*

As regards liability attending the use of specially dangerous things, the courts have been chiefly occupied with cases of a similar nature to those set out above; but other instances have from time to time, though less often, engaged their attention. This branch of the law cannot as yet be regarded as settled, but it is submitted that persons using things in their nature specially dangerous, such as loaded firearms, explosives, and poisonous drugs, do so at their peril, and are liable for any damage arising therefrom, wholly irrespective of any question of negligence (*m*). See the cases of *Dixon* v. *Bell* (*n*), *Langridge* v. *Levy* (*o*), *Farrant* v. *Barnes* (*p*), *George* v. *Skivington* (*q*), *Clarke* v. *Army and Navy Co-operative Society* (*r*), *Bamfield* v. *Goole, &c. Transport Co.* (*s*), *B. S. A. Co.* v. *Lennan* (*t*), and the American case of *Thomas* v. *Winchester* (*u*), and on the whole of this somewhat doubtful subject see Pollock, 9th ed. pp. 497—540.

[1908] 72 J. P. 448; *Mansell* v. *Webb* [1919] 88 L. J. K. B. 323; but see *Wing* v. *L. G. O. Co.*, p. 210, *supra*.

(*m*) *Dominion Natural Gas Co.* v. *Collins* [1909] A. C. 640.

(*n*) [1816] 5 M. & S. 198.

(*o*) *Supra*, p. 197.

(*p*) [1862] 11 C. B. N. S. 553.

(*q*) [1869] L. R. 5 Ex. 1.

(*r*) [1903] 1 K. B. 155; *supra*, p. 194.

(*s*) [1910] 2 K. B. 94.

(*t*) [1916] 85 L. J. P. C. 111.

(*u*) [1852] 6 N. Y. 397.

CHAPTER XI.

OF CERTAIN MISCELLANEOUS MATTERS.

Where a tort is also a felony, there is no right of action until the wrongdoer has been prosecuted for the crime or a reasonable excuse is given for not doing so. In the case of *Appleby* v. *Franklin* (*a*), Wills, J., in a Divisional Court, said, "The authorities . . . leave no room for doubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant until public justice has been vindicated by a prosecution of the criminal."

The attention of the Court was not, however, drawn either to the case of *Ex parte Ball* (*b*), or to that of *Midland Insurance Co.* v. *Smith* (*c*), and the law on this point could not therefore be considered as settled until the recent case of *Smith* v. *Selwyn* (*d*), which upholds the decision in *Appleby* v. *Franklin*.

(*a*) [1885] 17 Q. B. D. at p. 95.
(*b*) [1879] 10 Ch. D. 667.
(*c*) [1881] 6 Q. B. D. at p. 574.
(*d*) *Smith* v. *Selwyn* [1914] 3 K. B. 98.

"It is well established that according to the law of England, when injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution" (*e*).

It used to be said that the trespass was "merged in the felony," which until 1870 was practically true, as up to that date, on conviction of felony, the felon's property was forfeited to the Crown, and therefore it was useless to bring an action. "The principle upon which the rule is founded seems to be that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy" (*f*).

The rule has no application—

1. To misdemeanours.
2. Where the plaintiff is not the person injured by the felonious act of the defendant (*g*).

(*e*) Per Swinfen Eady, L.J., in *Smith* v. *Selwyn* [1914] 3 K. B. at p. 105.

(*f*) Per Huddleston, B., in *Appleby* v. *Franklin* [1885] 17 Q. B. D. at p. 94.

(*g*) *Osborn* v. *Gillett* [1873] L. R. 8 Ex. 88; *Appleby* v. *Franklin* [1885] 17 Q. B. D. 93.

3. Where the defendant is some person other than the person guilty of the crime (*h*).

The rule is enforced by the Court on summons in chambers or of its own motion, staying proceedings in the action until after prosecution (*i*). In *Ex parte Elliott* (*k*), the rule was effectually applied to exclude a proof in bankruptcy.

The difficult subject usually described by the misleading phrase "**Tort founded on contract**" cannot be treated satisfactorily in the limited space of this work. The reader is referred to Pollock, 11th ed., Chap. XIII. (where a full discussion of the subject will be found), and it should be observed that the key to the subject is, that the right of action is independent of the contract, and that the contract on the same subject is merely accidental. The following cases are worthy of especial note:—

Denton v. *G. N. R.* (*l*): An intending passenger was held to have a remedy for damage caused by acting on an erroneous announcement in a time-table, probably on the ground of the time-table amounting to a proposal of contract;

(*h*) *White* v. *Spettigue* [1845] 14 L. J. Ex. 99.

(*i*) *Smith* v. *Selwyn* [1914] 3 K. B. 98. The form of order is given at the end of the judgment of Kennedy, L.J., at pp. 104, 105.

(*k*) [1837] 3 M. & A. 110.

(*l*) [1856] 5 E. & B. 860.

certainly on the ground of its being a false representation.

Austin v. *G. W. R.* (*m*): Plaintiff—a child just above the age at which children can pass free of charge—was injured by an accident on defendant company's line whilst travelling with his mother, who had taken a ticket for herself only. Held, the company was liable, either as having contracted to carry the mother and her child, or, independently of contract, because the child was accepted as a passenger, and this cast a duty on the company to take reasonable care to carry him safely.

Marshall v. *York, Newcastle, and Berwick Railway Co.* (*n*): Plaintiff successfully sued defendant company for the loss of his luggage by the company's negligence, though the ticket was paid for by his master, on the ground that the company had accepted the servant and his luggage to be carried, and were answerable under the general duty thus arising; a duty which would still exist if the passenger and his luggage had been lawfully in the train without any contract at all.

Foulkes v. *Metropolitan District Railway Co.* (*o*): Plaintiff, a passenger, was hurt on alighting at a station, owing to the carriages

(*m*) [1867] L. R. 2 Q. B. 422.
(*n*) [1851] 11 C. B. 655.
(*o*) [1880] 5 C. P. D. 157.

being unsuited to the platform. The station and platform belonged to the South Western Railway Company, by whose clerk the plaintiff's ticket was issued; the train belonged to defendant company, who had running powers over the South Western line. Held, defendant company was liable, even if plaintiff's contract were with the South Western Railway Company, solely on the ground that defendant company actually received plaintiff as a passenger, and thereby undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey.

City of Birmingham Tramways Co. v. *Law* (*p*): The plaintiffs were the statutory lessees of a tramway owned by the Birmingham Corporation, who were bound to keep it in repair. The Corporation contracted with defendant for the relaying of the tramway. Owing to his negligence an accident happened and plaintiffs were compelled to compensate persons who were injured. Held, that plaintiffs, though they had no contract with defendant, were entitled to recover from him the amount so paid because his negligence interfered with their rights as lessees and also with their right of passage along the highway.

Alton v. *Midland Railway Co.* (*q*): Plaintiff

(*p*) [1910] 2 K. B. 965.
(*q*) [1865] 19 C. B. N. S. 213.

sued defendant company for loss of services of his servant, who was injured by defendant company's negligence whilst travelling on their line, the servant having paid for his ticket. It was held that no action lay, on the ground that the injury was caused by a breach of duty arising wholly out of the company's contract with the servant. Although this case has not been overruled, "it has," as Lindley, L.J., pointed out in the Court of Appeal (*r*), "been criticised and commented upon somewhat adversely"; and it is submitted that it is bad law, as being inconsistent with the principles laid down in *Marshall* v. *Y. N. & B. Railway Co.*, and *Foulkes* v. *M. D. Railway Co.* (*s*), which proceed on the existence of a duty, not only in form, but in substance, independent of contract. "The test question, whether the reception of the plaintiff's servant as a passenger would not have created a duty to carry him safely if there had not been any contract with him, is not directly dealt with. . . . A directly contrary decision has been given in the State of Massachusetts" (*t*). And it is clear

(*r*) In *Taylor* v. *Manchester, Sheffield, & Lincolnshire Ry. Co.* [1895] 1 Q. B. at p. 139.

(*s*) *Supra*, p. 230. See also *Baker* v. *Bolton* [1808] 1 Camp. 493; *Kelly* v. *Metropolitan Ry. Co.* [1895] 1 Q. B. 944; *Meux* v. *G. E. Ry. Co.* [1895] 2 Q. B. 387. For an application of the same principle in case of carriage of goods only, see *Hayn* v. *Culliford* [1879] 4 C. P. D. at p. 185, per Bramwell, L.J.

(*t*) Pollock, 11th ed., p. 553; and see the American case of

that the rule cannot apply where the death is not part of and essential to the cause of action. Thus, where a claim was made for damages under an implied warranty of fitness of goods which killed the plaintiff's wife, the plaintiff was held entitled to recover damages (*u*).

It is a general rule of the common law that the death either of the tort-feasor or of the party injured puts an end to the right of action for a tort.—This rule has been so far extended as to bar a master's right to sue for injuries to his servant which have resulted in the latter's death (*x*). It is usually expressed in the maxim *Actio personalis moritur cum personâ*, a maxim which is apt to mislead, for it appears to include contracts which, with the exception of promises of marriage (*y*), it does not, and never did. Executors have always been on the one hand able to sue, and on the other liable to be sued, on contracts entered into by their testator. The rule is now subject to the following exceptions:—

Ames v. *Union Ry. Co.* [1875] 117 Mass. 541, which expressly follows *Marshall's case* [1851] 11 C. B. 655.

(*u*) *Jackson* v. *Watson* [1909] 2 K. B. 193. (The claim was in *contract*.)

(*x*) *Osborn* v. *Gillett* [1873] L. R. 8 Exch. 88; *Clark* v. *L. G. O. Co.* [1906] 2 K. B. 648.

(*y*) Executors cannot sue for breach of promise of marriage without proof of special damage to their testator's personal estate: *Chamberlain* v. *Williamson* [1814] 2 M. & S. 408. Nor does the action lie against executors without special damage: *Finlay* v. *Chirney* [1888] 20 Q. B. D. 494.

I. In relation to the death of the injured person.

(1) **By statutes temp. Edw. 3 (4 Edw. 3, c. 7; 25 Edw. 3, c. 5)**, where an injury has been committed to the goods and chattels of a person who afterwards dies, the right of action survives to his executors and administrators.

(2) **By the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2**, where there has been an injury to the real estate of any person, and such person dies, the right of action survives to his executors or administrators, provided (i) the injury was committed within six months of owner's death; *and* (ii) the action is brought within one year after death.

(3) **By the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93)**, commonly called **Lord Campbell's Act, s. 1**, "where a person's death is caused by the wrongful act, neglect, or default of another, and the injured person, if he had lived, could have maintained an action, and recovered damages in respect thereof, the person who would have been liable in such case shall be liable to an action for damages, notwithstanding the death of the injured person, and although the death shall have been caused under such

circumstances as amount in law to a felony."

By **sect. 2,** such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

By the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), where there is no executor or administrator, or if no action is brought within six months by him, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative would have sued.

Lord Campbell's Act is a very strange one; strictly speaking, it is not an exception to the rule, for it did not reverse the common law maxim, as it surely ought to have done, but only allows the representative a new right of action if he or she falls within a very limited and clearly defined class of persons (husband, wife, parent, and child). "**Parent**" includes grandfather, grandmother, stepfather, stepmother; and "**child**" includes grandchild and stepchild, a child *en ventre sa mère* (*z*), but not an illegitimate child (*a*).

The jury must apportion the damages awarded amongst the persons for whose benefit the action

(*z*) *The George and Richard* [1871] L. R. 3 Ad. & Ecc. 466.
(*a*) *Dickinson* v. *N. E. Ry. Co.* [1863] 2 H. & C. 735.

is brought. By sect. 4, the action must be brought within one year after death, and only one action can be brought for the same cause of complaint.

The parties for whose benefit the action is brought are to be compensated only for the **pecuniary loss** they suffer through the death of the deceased. Thus, no action lies for merely nominal damages (*b*); nor can the jury lawfully increase the damages by adding a solatium for the mental sufferings incurred by the death (*c*); nor can funeral expenses be recovered (*d*); but a legal right to receive benefit from the deceased need not be shown (*e*). In the words of Pollock, C.B., in *Franklin* v. *S. E. Railway Co.* (*f*), "the damages . . . should be calculated in reference to a reasonable expectation (*g*) of pecuniary benefit, as of right or otherwise, from the continuance of the life." Sums which became due on the death by virtue of any policy of assurance are not to be taken into account (*h*).

There is no action if the deceased had accepted satisfaction for his injuries before his death, nor

(*b*) *Duckworth* v. *Johnson* [1859] 29 L. J. Ex. 25.
(*c*) *Blake* v. *Mid. Ry. Co.* [1852] 18 Q. B. 93.
(*d*) *Dalton* v. *S. E. Ry. Co.* [1858] 4 C. B. N. S. 296; *Clark* v. *L. G. O. Co.* [1906] 2 K. B. 648.
(*e*) *Franklin* v. *S. E. Ry. Co.* [1858] 3 H. & N. 211.
(*f*) [1858] 3 H. & N. at p. 214.
(*g*) *Jenkins* v. *Taff Vale Ry. Co.* [1913] A. C. 1.
(*h*) Fatal Accidents (Damages) Act, 1908.

if the loss arises not from the relationship, but through some contract, with the deceased.

Lord Campbell's Act applies to the case of a foreigner whose death is caused by an accident on the high seas, at all events where the defendant is English (*i*).

(4) By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, where a workman whilst engaged in his employer's service sustains personal injury from certain causes specified in the Act (see pp. 50-52, *supra*), and "the injury results in death, the legal personal reperesentatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

(5) By the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13, "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable.

(*i*) *Davidson* v. *Hill* [1901] 2 K. B. 606.

'Dependants' mean such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but for the incapacity due to the accident, have been so dependent, and, where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively." And where a right to compensation has vested in a "dependant," who dies before the award, the right passes to the personal representatives of the dependant (*k*).

II. In relation to the death of the tort-feasor.

(1) **Independently of statute,** where property, or the proceeds of property, belonging to another have been appropriated by the deceased wrongdoer, and added to his own estate or moneys, an action lies against the executor of the wrongdoer, but this rule is limited to the recovery of **specific acquisitions, or**

(*k*) *United Collieries* v. *Simpson* [1909] A. C. 383.

their value, and can only be maintained if there is some beneficial property or value capable of being measured, followed, and recovered. Thus, an action will lie in respect of ore dug or timber cut by the deceased wrongdoer, but not for an assault, or for ploughing up meadows (*l*).

(2) **By the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2,** an action may be brought against the executors and administrators of the deceased wrongdoer for wrongs done by the deceased in respect of real or personal property of the plaintiff, provided—

(1) The injury was committed within six calendar months of the wrongdoer's death; and

(2) The action is brought within six months of the appointment of executors and administrators.

(*l*) *Bishop of Winchester* v. *Knight* [1717] 1 P. W. 406; *Phillips* v. *Homfray* [1883] 24 Ch. D. 439; *Peek* v. *Gurney* [1873] L. R. 6 H. L. 377; *In re Duncan, Terry* v. *Sweeting* [1899] 1 Ch. 387.

CHAPTER XII.

OF REMEDIES AND MEASURE OF DAMAGES RECOVERABLE.

Remedies are either (A) Judicial, or (B) Extra-judicial.

(A) Judicial.

I. An action for damages (*a*), which are:—

1. Nominal.—A sum of no substantial amount awarded in two classes of cases—(a) when the plaintiff seeks to establish a right and does not ask for substantial damages; (b) when the jury think that though the plaintiff has a claim he has suffered no real damage, in which case the damages are said to be **contemptuous** (*b*).

In certain cases the plaintiff must prove actual damage, or he will fail, *e.g.*, in an

(*a*) Until judgment damages in an action of tort are not assignable: *Defries* v. *Milne* [1914] 1 Ch. 98; *Glegg* v. *Bromley* [1912] 81 L. J. K. B. 334.

(*b*) See the observations of Phillimore, J., in *Redman's Syndicate* v. *Associated Newspapers* [1910] 26 T. L. R. at p. 395. See also *Macalister* v. *Steedman* [1911] 27 T. L. R. 217; *Wootton* v. *Sievier* [1913] 29 T. L. R. 724; *Gamble* v. *Sales* [1920] 36 T. L. R. 427.

action for conspiracy (*c*), negligence (*d*), nuisance (*e*), deceit (*f*), and in certain cases of slander (*g*).

2. **Ordinary.**—A sum awarded as a fair measure of compensation (*not* restitution) to plaintiff.

3. **Exemplary.**—Expressing indignation at defendant's wrong, not mere compensation to plaintiff—*e.g.*, in an action for seduction (*h*), or trespass accompanied by insult (*i*).

Measure of damages recoverable (*j*).—It is impossible here to give more than an outline of the subject (*k*).

Three questions have to be considered:—

(i) What **circumstances** should the jury take into account in assessing damages?

(ii) What **amount** should they award?

(iii) In reference to what **time** is their award to be made?

(i) Circumstances.—The jury are subject to the direction of the Court as to what consequences of

(*c*) *Supra*, p. 121. (*d*) *Supra*, p. 204.
(*e*) *Supra*, p. 82. (*f*) *Supra*, p. 190.
(*g*) *Supra*, p. 140. (*h*) *Supra*, p. 119.
(*i*) *Merest* v. *Harvey* [1814] 5 Taunt. 441.
(*j*) For the measure of damages as to collision at sea, see p. 217, *supra*.
(*k*) For more detailed information the reader is referred to one of the larger treatises, such as Mayne on Damages.

the wrongful act are to be taken into account, or rejected as being too **remote** (*l*).

The general rule is that the wrongdoer is liable for the **natural and probable consequences** of his act (*m*). He is further liable for any **special consequences** which may ensue if he has, at the time of his wrongdoing, **notice** of the special circumstances by reason whereof those consequences will naturally and probably ensue as a result of his wrongdoing (*n*), for "the rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort" (*o*).

There are numerous examples of this rule. Thus, after some doubt, it was settled that the illegal acts of third parties come within it, if such acts were contemplated or reasonably to be expected as a consequence of the defendant's wrongful acts (*p*). So, too, a person who utters a slander to a third party whom he authorizes to repeat it, or whose duty it is to repeat it, will be

(*l*) Per Blackburn, J., in *Hobbs* v. *L. & S. W. Ry. Co.* [1875] L. R. 10 Q. B. at p. 122; and per Lord Esher, M.R., in *Hammond* v. *Bussey* [1888] 20 Q. B. D. at p. 89.

(*m*) *Hadley* v. *Baxendale* [1854] 9 Exch. 341.

(*n*) *Ibid.*; *Hydraulic Engineering Co.* v. *McHaffie* [1878] 4 Q. B. D. 670.

(*o*) Per Lord Esher, M.R., in *The Notting Hill* [1884] 9 P. D. at p. 113.

(*p*) *Lynch* v. *Knight* [1860] 9 H. L. Cas. at p. 600; *McDowall* v. *G. W. Ry. Co.* [1902] 1 K. B. 618; *Porter* v. *Tottenham U. D. C.* [1914] 1 K. B. 563.

liable for the consequences of its repetition (*q*), but not if the third party voluntarily repeats it, being under no obligation to do so (*r*). If a ship sinks another ship which is under tow, the tug owner cannot claim from the owner of the ship in fault the amount which he has lost through the towage contract having become impossible of performance (*s*). If a man allows his sheep to stray on another's land and they develop scab there, with the consequence that these sheep are placed in quarantine on that land and also all the sheep of the owner of the land which have been in contact with the trespassing sheep, the damage so caused to the owner is recoverable (*t*).

The jury will not assess damages for losses the amount of which depends upon a series of contingencies which might never occur (*u*); but mere difficulty of assessment is no bar (*v*).

It is not a natural consequence of overcrowding in a railway carriage that one passenger should steal from another (*x*). Again, if ancient lights be obstructed, damages cannot be obtained

(*q*) *Kendillon* v. *Maltby* [1842] Car. & M. at p. 408.

(*r*) *Ward* v. *Weeks* [1830] 7 Bing. 211; but see *Riding* v. *Smith* [1876] 1 Ex. D. 91, at p. 94; and *Ratcliffe* v. *Evans* [1892] 2 Q. B. 524.

(*s*) *La Société de Remorquage* v. *Bennett* [1911] 1 K. B. 1243.

(*t*) *Theyer* v. *Purnell* [1918] 2 K. B. 333.

(*u*) *Sapwell* v. *Bass* [1910] 2 K. B. 486.

(*v*) *Chaplin* v. *Hicks* [1911] 2 K. B. 786.

(*x*) *Cobb* v. *G. W. Ry. Co.* [1893] 1 Q. B. 459; *Anglo-Algerian S.S. Co.* v. *Houlder* [1908] 1 K. B. 659.

in respect of other lights also obstructed but which are not ancient (*y*).

Where the tort arises out of a contract, the parties may, in general, agree in the contract what amount shall be recoverable (*z*).

The loss must result from the wrongful act. Thus, where plaintiff's ship was injured through the negligence of A., who was then acting as the *defendant's* servant, but the damage was increased through A., who had resumed his position as *plaintiff's* servant, not taking proper precautions, it was held that only damages could be awarded in respect of the original loss (*a*).

Again, if the plaintiff in consequence of an accident caused by defendant's negligence voluntarily pays money which he is under no liability to pay, that circumstance ought not to be taken into account in assessing damages against the defendant (*b*).

As to damages caused by shock without physical contact, see p. 205, *supra*.

Even where the motive is immaterial the jury in assessing damages are entitled to take into

(*y*) Per Lord Esher, M.R., *In re London, Tilbury and Southend Ry. Co.* [1889] 24 Q. B. D. at p. 329; see also *The Bruxellesville* [1908] P. 312.

(*z*) *Baxter* v. *Royal Mail, &c., Co.* [1908] 2 K. B. 626; but see *Clarke* v. *West Ham Corporation* [1909] 2 K. B. 858.

(*a*) *The Egyptian* [1910] A. C. 400; and see *The Bodlewell* [1907] P. 286; *The Annie* [1909] P. 176.

(*b*) *The Amerika* [1914] P. 167.

consideration the existence of a wrong motive (*c*) or conduct, *e.g.*, insult (*d*), but not in such a way as to assess damages for it, as though it were a cause of action in itself (*e*). And in like manner the jury may also take into account anything in the nature of excuse (*f*).

Where, however, a tort is committed by two or more joint tort-feasors (*g*), the true criterion is the whole injury sustained from the joint wrongful act, and the wrong motive or reasonable conduct of one of the joint tort-feasors should not be taken into account in order to aggravate or mitigate the damages in regard to the other (*h*). When the claim against them is joint a single judgment alone is entered. Consequently the jury cannot award one sum against one defendant and another against the other (*i*). Nor should the motive be considered when the defendant is only liable on the principle of "*respondeat superior*" (*j*).

(*c*) *Emblen* v. *Myers* [1861] 6 H. & N. 54; *Bell* v. *M. Ry. Co.* [1861] 10 C. B. N. S. 287.

(*d*) *Merest* v. *Harvey* [1814] 5 Taunt. 441.

(*e*) *Anderson* v. *Calvert* [1908] 24 T. L. R. 399.

(*f*) *Linford* v. *Lake* [1858] 3 H. & N. 276; *Skull* v. *Glenister* [1864] 16 C. B. N. S. 81.

(*g*) The fact that two dogs together do damage does not make their owners joint tort-feasors, and so liable for all the damage done, even when each is liable for the damage caused by his dog: *Piper* v. *Winnifrith* [1917] 34 T. L. R. 108.

(*h*) *Clark* v. *Newsam* [1847] 1 Exch. 131.

(*i*) *London Association* v. *Greenlands* [1916] 2 A. C. 15; *Damiens* v. *Modern Society* [1911] 27 T. L. R. 164.

(*j*) *Black* v. *N. Brit. Ry. Co.* [1908] S. C. 444.

(ii) Amount.—Where there are no circumstances of aggravation, the amount awarded should be a reasonable compensation to the plaintiff. Unlike cases of breach of contract, however, it is frequently impossible to ascertain exactly what is the proper amount, and the jury must do their best on the circumstances they have to take into account (*k*).

For example, in an action arising out of an accident, the plaintiff usually claims for three items: pain and suffering, necessary expenses incurred, and loss of earnings and earning capacity. It is obvious that, on the first item, the jury ought not to take the poverty or wealth of the plaintiff into account; on the second, they may or may not do so according to the circumstances of each case, while on the third it is their duty to do so (*l*).

Damages are, as a rule, only an indemnity. Thus, the defendant is not bound to pay the plaintiff for a **new** thing to replace the **old** thing destroyed (*m*). So, too, if he detains a ship which the plaintiff was using on an unremunerative route in the hope of future profit, he is not

(*k*) Thus, it is impossible exactly to estimate the damage accruing from injury to a warship, but it will be awarded in a proper case: *The Astrakhan* [1910] P. 172; cf. *Yzquierdo* v. *Clydebank Engineering Co.* [1902] A. C. 524; *The London* [1914] P. 72; and see *Chaplin* v. *Hicks* [1911] 2 K. B. 786.

(*l*) *Phillips* v. *L. & S. W. Ry. Co.* [1879] 5 Q. B. D. 78.

(*m*) *Lodge Holes Colliery Co.* v. *Wednesbury Corporation* [1908] A. C. 323.

liable to pay damages for the detention, for the plaintiff has suffered no loss (*n*).

The plaintiff is bound not only not to augment the loss (*o*), but also to do all that he reasonably can to mitigate the loss, and if he succeeds in doing so, the measure of damage is still the actual loss, although if the plaintiff had done nothing, the loss would have been greater (*p*).

In general if the jury exercise their duty fairly and reasonably, their verdict will not be upset, even though the Court disagrees with their estimate.

The Court will, however, order a new trial if the damages awarded are so large that no twelve reasonable men could have given them (*q*), it being clear the jury were influenced by undue motives or considerations to which they should not pay attention (*r*), or were under a misconception of the facts (*s*). So, too, if the damages are inadequate, being clearly due to a mistake in calculation or misconduct of the jury (*t*). But a new trial will not be ordered merely because

(*n*) *The Bodlewell* [1907] P. 286.
(*o*) *Jones* v. *Watney* [1912] 28 T. L. R. 399.
(*p*) *British Westinghouse Co.* v. *Underground Electric Railways* [1912] A. C. 673; but see *Jamma* v. *Moolla* [1916] 1 A. C. 175.
(*q*) *Praed* v. *Graham* [1889] 24 Q. B. D. 53.
(*r*) *Chattell* v. *Daily Mail* [1901] 18 T. L. R. 165.
(*s*) *Creed* v. *Fisher* [1856] 9 Exch. 472; *Gough* v. *Farr* 1 Y. & J. 477.
(*t*) *Armitage* v. *Haley* [1843] 4 Q. B. 917.

the verdict is the result of a compromise, for it must be clearly shown that the verdict really amounts to a refusal by the jury to perform their duty (*u*).

(iii) Time.—Damages resulting from **one and the same cause of action** must be assessed and recovered once for all; *contra*, where the same facts give rise to **two distinct causes of action.** In *Brunsden* v. *Humphrey* (*x*), plaintiff, whilst driving in his cab, was injured by defendant's negligence. Having recovered damages in an action for the injury to the cab, he then brought a second action for personal injuries. Held, he was entitled to do so, there being two distinct causes of action.

Where, therefore, a person has recovered damages, he cannot sue again in respect of unexpected consequences, which have developed afterwards (*y*), and for that reason the jury must take the expectation of future loss into account (*z*). The general rule is that "new actions may be brought as often as new injuries and wrongs are repeated, and not as often as new damage accrues" (*a*). In some cases, however, damage accruing after action may be the founda-

(*u*) *Falvey* v. *Stanford* [1875] L. R. 10 Q. B. 54.
(*x*) [1884] 14 Q. B. D. 141.
(*y*) *Fetter* v. *Beale* [1697] 2 Lord Raym. 339.
(*z*) *Richardson* v. *Mellish* [1824] 2 Bing. 229.
(*a*) *Hambleton* v. *Veere* [1670] 2 Wms. Saund. 171 (b), note 1.

tion of a fresh action, *e.g.*, in a continuing trespass (*b*), or in subsidences (*c*).

II. An application for an injunction.—This is only granted where damages would not be an adequate remedy, and only in cases where the act restrained would give rise to a cause of action (*d*). Damages for past injury and an injunction restraining repetition of the wrongful act can of course be claimed in the same action (*e*). An interim injunction is only granted when delay would prevent or render extremely difficult the subsequent administration of complete justice.

It used to be thought that an injunction should not be granted to restrain the publication of a libel unless it amounted to a contempt of Court (*f*), but it is now clear that such injunctions, either interlocutory (*g*) or final (*h*), will be granted in proper cases (*i*).

In case of need, an injunction will be issued to restrain a son going to his parent's house (*k*).

(*b*) *Holmes* v. *Wilson* [1839] 10 Ad. & E. 593.
(*c*) *Infra*, pp. 256—257.
(*d*) *Webster* v. *Webster* [1916] 1 K. B. 714; *Ware and De Freville* v. *Motor Trade Association* [1921] 37 T. L. R. 213.
(*e*) *Gilling* v. *Gray* [1910] 27 T. L. R. 39.
(*f*) *Anon.*, 2 Atk. 469; *Clark* v. *Freeman* [1848] 11 Beav. 112.
(*g*) *Bonnard* v. *Perryman* [1891] 2 Ch. 269; *Monson* v. *Tussauds* [1894] 1 Q. B. 671.
(*h*) *Saxby* v. *Easterbrook* [1878] 3 C. P. D. 339.
(*i*) See pp. 175—178, *supra*.
(*k*) *Stevens* v. *Stevens* [1907] 24 T. L. R. 20.

Under the Judicature Act, 1873 (*l*), the Court has power to award damages in addition to or substitution for an injunction.

This discretion is exercised according to the facts of each case, but it will never be exercised so as to compel plaintiff to give the defendant property or rights which the plaintiff is entitled to refuse to grant to him (*m*). But in certain cases the discretion will be exercised, *e.g.*, if the plaintiff has himself used the claim for an injunction in order to extort damages, then it will be granted. It has been laid down as a good working rule "that (first) if the injury to the plaintiff's legal right is small, and (secondly) is one which is capable of being estimated in money, and (thirdly) is one which can be adequately compensated by a small money payment, and (fourthly) the case is one in which it would be oppressive to the defendant to grant an injunction, damages in lieu of an injunction may be awarded" (*n*).

(B) Extra-judicial.—Roughly comprised under self-help:—

1. Abatement of nuisance (*o*).

(*l*) Sect. 34, replacing Lord Cairns' Act.

(*m*) *Greenwood* v. *Hornsey* [1886] 33 Ch. D. 471.

(*n*) Per A. L. Smith, L.J., in *Shelfer* v. *City of London E. L. Co.* [1895] 1 Ch. at p. 322; cf. *Jordeson* v. *Sutton Gas Co.* [1899] 2 Ch. 217; and *Riley* v. *Halifax Corporation* [1907] 97 L. T. 278.

(*o*) *Supra*, pp. 60, 83.

2. Expulsion of trespasser (*p*).
3. Peaceable re-entry on land on which possession has been wrongfully taken (*q*).
4. Recaption (*r*).
5. Distress damage feasant; *i.e.*, the taking by an occupier of land of animals (*s*) or other chattels found encumbering or causing damage to his land. Under such circumstances the occupier is entitled to detain the chattels until he is tendered or paid a fair compensation for the injury (*t*).

No more force is to be used and no more damage done than is absolutely necessary.

What is the remedy of a private individual complaining of the infringement of a special statutory duty? Where the statute creating the duty indicates **a remedy of a private nature**—*i.e.*, a remedy compensating the injured party (*e.g.*, an action for penalties for the use and benefit of such person)—then such remedy will generally be the only remedy. Where no such remedy of a private nature is provided, the injured party has not necessarily a private right of action. Whether he has or not depends on the scope and

(*p*) *Supra*, p. 57.
(*q*) *Supra*, p. 60.
(*r*) *Supra*, p. 60.
(*s*) As to the place for impounded animals, see 1 Ph. & M. c. 12 and see also *Coaker* v. *Willcocks* [1911] 2 K. B. 124.
(*t*) Addison on Torts, 8th ed. p. 102.

language of the statute taken as a whole (*u*). Moreover, there can be no right of action unless the object of the statute is to prevent injury of the nature complained of. In *Gorris* v. *Scott* (*x*), plaintiff's sheep were washed overboard during a voyage from a foreign port to England, owing to defendant omitting to take the precautions required by the Contagious Diseases (Animals) Act, 1869. Held, defendant was not liable, the object of the statute being to prevent the spread of contagious disease, not to protect animals against the perils of the sea.

In order to maintain an action here in respect of a tort committed outside the jurisdiction, the act complained of must be—

1. **Wrongful by English law.** Thus, in *The Halley* (*y*), there was a collision in Belgian waters. By Belgian law, but not by English law, the owners of the ship were liable, as the collision was caused by the negligence of a pilot compulsorily on board. Therefore they were not held liable here.

(*u*) *Atkinson* v. *Newcastle Waterworks Co.* [1877] 2 Ex. Div. 441; *Clegg, Parkinson & Co.* v. *Earby Gas Co.* [1896] 1 Q. B. 592; *Groves* v. *Wimborne* [1898] 2 Q. B. 408; *Johnston* v. *Consumers Gas Co.* [1898] A. C. 447; *Dawson* v. *Bingley U. D. C.* [1911] 2 K. B. 149.

(*x*) [1874] L. R. 9 Ex. 125.

(*y*) [1868] L. R. 2 P. C. 193, 204.

2. **Not justifiable by the law of the country where committed** (*z*).
3. **Not of a purely local nature**—*e.g.*, trespass to land (*a*).

Joint tort-feasors may be sued jointly or severally; in other words, where two or more persons have participated in a wrongful act, each wrongdoer is liable for all the damage. Thus, in *Hume* v. *Oldacre* (*b*), the huntsman was held personally liable for all the damage caused by the hunt. The injured party may sue any one or more of the wrongdoers or all of them; **but judgment against one or more is a bar to any further action.**

On the same principle a release granted to one or more of the wrongdoers operates as a discharge of the others, "the reason being that the cause of action which is one and indivisible having been released, all persons otherwise liable thereto are consequently released" (*c*). But a covenant not to sue one of two joint tort-feasors does not operate as a release of the other from liability,

(*z*) *Blad's case* [1673—4] 3 Swanst. 603; *The M. Moxham* [1876] 1 P. D. 107; *Machado* v. *Fontes* [1897] 2 Q. B. 231; *Carr* v. *Fracis Times & Co.* [1902] A. C. 176.

(*a*) *Brit. S. Af. Co.* v. *Companhia de Moçambique* [1893] A. C. 602.

(*b*) [1816] 1 Stark. 352; but see *Piper* v. *Winnifrith* [1917] 34 T. L. R. 118, *supra*, p. 245.

(*c*) Per A. L. Smith, L.J., in *Duck* v. *Mayeu* [1892] 2 Q. B. at p. 513 (C. A.); and see *Howe* v. *Oliver* [1908] 24 T. L. R. 781.

"the reason being that the joint action is still alive" (*d*).

There is **no contribution between wrongdoers**—*i.e.*, if one of several has been sued, and damage recovered from him, he cannot claim contribution from the others (*e*). Even where there is an express or implied indemnity given to a wrongdoer, the indemnity cannot be enforced if the wrong is so obviously unlawful that no reasonable man in committing it could suppose that he was doing a lawful act (*f*).

"It is," however, "a general principle of law when an act is done by one person at the request of another, which act is **not in itself manifestly tortious** to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done" (*g*).

(*d*) Per A. L. Smith, L.J., in *Duck* v. *Mayeu* [1892] 2 Q. B. at p. 513 (C. A.); and see also the observations of Vaughan Williams, L.J., in *Rice* v. *Reed* [1900] 1 Q. B. at p. 67.

(*e*) *Merryweather* v. *Nixan* [1799] 8 T. R. 186; see *Palmer* v. *Wick* [1894] A. C. 318; *The Englishman and The Australia* [1895] P. 212; and *Burrows* v. *Rhodes* [1899] 1 Q. B. 816. There is an exception in claims for personal injuries arising from collisions at sea (Maritime Conventions Act, 1911, s. 3).

(*f*) *Smith* v. *Clinton* [1908] 99 L. T. 840; *Adamson* v. *Jarvis* [1827] 4 Bing. 66; cf. *Ramskill* v. *Edwards* [1885] 31 Ch. D. 100; *Newcombe* v. *Yewen R. D. C.* [1913] 29 T. L. R. 299.

(*g*) Per Halsbury, L.C., in *Sheffield Corporation* v. *Barclay* [1905] A. C. at p. 397.

CHAPTER XIII.

OF LIMITATION OF ACTIONS.

The law on the subject of the limitation of actions of tort is contained in the statutes 21 Jac. 1, c. 16, 4 & 5 Anne, c. 3, and 19 & 20 Vict. c. 97, and has been summarized as follows (*a*):—

Trespass to land and goods, conversion, and all other common law wrongs, **except slander by words actionable per se, and injuries to the person.**—Six years.

Injuries to the person.—Four years.

Slander by words actionable *per se*.—Two years.

The statutes begin to run against infants and lunatics on disability ceasing (*b*); and if the defendant is beyond the seas when the right of action arises, the time runs against the plaintiff

(*a*) Pollock, 11th ed., p. 208.

(*b*) Formerly this was also true in regard to married women. Since the Married Women's Property Act, 1882, however, a married woman is no longer under disability, but can sue as if she were a *feme sole*. See p. 9, *supra*, and *Lowe* v. *Fox* [1885] 15 Q. B. D. 667.

only from his return. Any action brought against a constable for anything done in the execution of his office must be brought within six months from the date of the act complained of (*c*); and any action against any person for an act done in pursuance or execution or intended execution of a statutory or public duty or authority must be brought within a similar period, or in case of a continuance of injury or damage within six months next after the ceasing thereof (*d*).

Where a wrongdoer fraudulently conceals his wrongful act, the statute does not begin to run in his favour until the person wronged discovers the wrongdoing, or might by reasonable diligence discover it (*e*).

It is important to notice the distinction between **wrongs which are actionable per se, and those which are only actionable where the defendant can prove that he has suffered actual damage** (*f*). In the former case the statutes begin to run **from the time when the wrongful act is committed**; in the latter, as, for example, where the right to support of land has been infringed, the statutes begin to run **not from time of commencement of**

(*c*) 24 Geo. 2, c. 44, s. 8.

(*d*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, sub-s. (a); *Gregory* v. *Torquay Corporation* [1912] 1 K. B. 442; see *supra*, pp. 21—24.

(*e*) *Gibbs* v. *Guild* [1882] 9 Q. B. D. 59; *Thorne* v. *Heard* [1895] A. C. 495; *In re McCallum* [1901] 1 Ch. 143.

(*f*) See *supra*, pp. 4, 140.

wrongdoing, but from time of plaintiff's first sustaining actual injury; consequently, plaintiff is not necessarily barred by the Statute of Limitations from maintaining an action seven or eight years after defendant's beginning to do what ultimately resulted in injury to the plaintiff (*g*).

In *Darley Main Colliery Co.* v. *Mitchell* (*h*), the defendant, owner of a coal mine, worked it in 1868, thereby letting down plaintiff's cottages, which defendant repaired. In 1882, owing to the same working in 1868, a further subsidence took place, and further damage. Defendant pleaded that the damage took place more than six years after the working of mines had ceased. Held, by the House of Lords, that each subsidence gave a fresh cause of action when arising, and that therefore the action lay.

Many statutes have special provisions as to limitation of actions. Thus the Maritime Conventions Act, 1911, provides that claims against vessels in respect of collisions must be commenced within two years, and in respect of contribution between vessels jointly responsible, within one year, and contains the unusual provision that courts having jurisdiction may make rules of court extending the periods named and also that they shall do so to enable the defendant

(*g*) *Backhouse* v. *Bonomi* [1861] 9 H. L. C. 503.
(*h*) [1886] 80 L. T. 264; *West Leigh Co.* v. *Tunnicliff* [1908] A. C. 27; and see *Glynn* v. *Howell* [1909] 1 Ch. 666.

vessel to be arrested if there has not been reasonable opportunity of doing so within the periods named (*i*). Actions for infringement of copyright must be commenced within three years (*k*).

(*i*) Maritime Conventions Act, 1911, s. 8.
(*k*) Copyright Act, 1911, s. 10.

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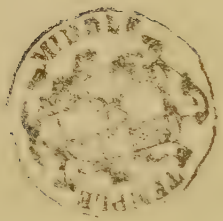

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